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May 17, 2004

BY HAND DELIVERY

Mr. Walter Thomas
Secretary
Alabama Public Service Commission
RSA Union Building
8th Floor
100 N. Union Street
Montgomery, Alabama 36104

Re: Petition for Arbitration of ITC>DeltaCom Communications, Inc. With BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996; Docket No. 28841

Dear Mr Thomas:

Enclosed for filing are the original and ten copies of the Comments of Competitive Carriers of the South, Inc. ("CompSouth") to the above-referenced petition for arbitration.

Sincerely,

Paul A. Clark

PAC:bd
Enclosures

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BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Petition for Arbitration of	)	Docket No. 28841
ITC^DeltaCom Communications, Inc.	)	
With BellSouth Telecommunications, Inc.	)	
Pursuant to the Telecommunications	)	
Act of 1996	)	

COMMENTS OF COMPSOUTH

By Notice dated May 5, 2004, the Alabama Public Service Commission stated that interested parties must file within ten days any comments on the Arbitration Panel Recommendations dated April 27, 2004 in this docket. Pursuant to that Notice, Competitive Carriers of the South, Inc.[1] ("CompSouth") files the following comments concerning the panel majority's[2] recommendation on Issue 25, which addresses BellSouth's practice of refusing to provide its digital subscriber line ("DSL") service to customers of competitive local exchange carriers ("CLECs") over the same telephone lines that CLECs use to provide the unbundled network element platform ("UNE-P"). This Commission already has concluded that it has jurisdiction to address BellSouth's DSL practice and that BellSouth's request that the FCC overturn state commission decisions forbidding the practice, if granted, would "stifle" local

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[1] CompSouth's 18 competitive local exchange carriers doing business in the Southeast include: ITC^DeltaCom; MCI; Access Point, Inc.; LecStar; NewSouth Communications Corp.; AT&T; Nuvox Communications, Inc.; Access Integrated Networks, Inc.; Birch Telecom; Talk America; Cinergy Communications Company; Z-Tel Communications; Network Telephone Corp.; Momentum Business Solutions; Covad; KMC Telecom; IDS Telecom, LLC; and Xspedius Corp. National association members include the CompTel/Ascent Alliance and Promoting Active Competition Everywhere (PACE).

[2] Issue 25 was the only issue in the arbitration not decided by unanimous vote, with two panelists voting in favor of BellSouth's position and one in favor of ITC^DeltaCom's position.

competition.[3] The majority's recommendation flies in the face of the Commission's previously stated position on the DSL issue and therefore should be rejected.

I. BACKGROUND

Issue 25 concerns whether BellSouth should "continue providing an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end user on the same line." BellSouth's current practice in Alabama is that it will not permit its DSL customers (whether retail or wholesale) to migrate to a CLEC for UNE-P service, and will not permit CLEC UNE-P customers to obtain BellSouth retail or wholesale DSL service. To obtain BellSouth DSL service, in other words, a customer either must receive BellSouth's retail voice service or CLEC resale service. If a consumer with BellSouth DSL for some reason succeeds in migrating to a UNE-P CLEC for voice service, the customer will be required to return to BellSouth for voice service or BellSouth will terminate the customer's DSL service.

Ignoring this Commission's previous conclusion that states do have jurisdiction to address BellSouth's practice, two of the three arbitration panelists issued a recommendation in favor of BellSouth on Issue 25, primarily on jurisdictional grounds. In the only dissent on any issue in the case, Facilitator Mark Montiel pointed out that the Commission had taken the position in favor of state jurisdiction in comments it filed in proceedings before the FCC on January 30, 2004. Facilitator Montiel also observed that the Commission had "commented that allowing BellSouth to engage in this practice is not in the interest of competition and consumer choice, but rather would stifle competition in the local service market required by the 1996 Act."

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[3] See Comments of the Alabama Public Service Commission ("Alabama PSC Comments") filed in *In Re BellSouth's Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Such Services to CLEC Voice Customers*, WC Docket No. 03-251

Dissent, p. 1. He further noted that NARUC had taken a similar position in the same proceeding; that four state public service commissions had issued rulings requiring BellSouth to discontinue its practice; and that a federal district court has affirmed one of those commission decisions. *Id.* at 2-3. The dissenting opinion is clearly in line with the stated policy of this Commission and therefore should be adopted.

II. BELLSOUTH'S DSL PRACTICE IS ANTICOMPETITIVE

The anticompetitive nature of BellSouth's policy is plain. BellSouth refuses to provide its DSL service to customers that choose a competitor because this practice prevents customers from selecting voice providers other than BellSouth, even though the customers otherwise would have preferred an alternative local provider. Thus, BellSouth is willing to risk losing its DSL customer and receiving only the UNE-P wholesale revenue on a line in the hope that it will retain both the customer's retail voice revenue and its DSL revenue. BellSouth clearly expects to win this game of chicken most of the time. BellSouth's ability to execute its profit maximization strategy illustrates both the power conferred by BellSouth's dominance of the DSL market and BellSouth's abuse of that power. The Commission should reject BellSouth's blatant attempts to intimidate Alabama consumers into forfeiting their rights to choose an alternative local provider.

There are a number of reasons why FastAccess and other BellSouth DSL customers do not wish to relinquish their service. In the first instance, there are many areas in which BellSouth is the only DSL provider. As this Commission has stated, "[c]ustomers of BellSouth that have DSL service will be very reluctant to change voice service providers if they cannot continue to use their DSL service." Alabama PSC Comments at 3. Even if these customers had another broadband provider to choose from, changing carriers would involve disconnecting the

DSL service, obtaining a different DSL modem, and possibly having to pay early termination fees to BellSouth. In addition, the customer also would have to arrange to establish new broadband service, pay any connection fees the new provider required, change his or her e-mail address and notify his or her contacts of that change. Not surprisingly, many FastAccess and other BellSouth DSL customers are deciding to stay with BellSouth for their voice service rather than switching to a UNE-P CLEC. Of course, that is the intended result of BellSouth's DSL practice.

As BellSouth's service continues to grow rapidly in Alabama, BellSouth's DSL practice, if left unchecked, would continue to seal off more and more Alabama consumers from the benefits of local competition. The Georgia Commission noted, for example that in MCI's DSL complaint case against BellSouth, "MCI provided evidence that it received more than 4,900 DSL rejects relating to more than 4,056 customer telephone numbers."[4] Moreover, after BellSouth altered its systems to stop such orders from rejecting, "more than 2,000 DSL customers were migrated to MCI that previously would have been rejected and returned to BellSouth." Georgia DSL Order, p. 14. Because these customers had been migrated to MCI while still having BellSouth DSL service, they either had to return to BellSouth or discontinue their DSL service. ITC^DeltaCom and other CLEC members of CompSouth are losing local customers in Alabama because of BellSouth's practice. For example, from May 1 to May 11, 2004, MCI lost 123 local lines in Alabama because the customers who wished to migrate to MCI had BellSouth DSL service. At that rate, just one CLEC would lose 335 local lines per month as a result of BellSouth's practice, in each case denying consumer choice.

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[4] *In Re: Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of*

BellSouth's DSL practice not only targets UNE-P voice competition, but also effectively prevents VoIP providers from using BellSouth's lines to offer local service. That is so because by refusing to permit its customers to buy DSL-only service, and tying its DSL service to its voice product, BellSouth deprives VoIP providers from having any economic way of serving Alabama customers. Obviously, if a customer already is receiving BellSouth's voice service along with DSL, it has no need for a VoIP provider's service. BellSouth's practice thus limits the channels VoIP carriers can use and restricts that emerging form of local competition.

Although BellSouth has sought to justify its anticompetitive practice on the grounds that it promotes its build out of DSL facilities, that argument is especially weak in Alabama. Here, the Commission has permitted BellSouth to use more than $50 million in federal universal service funds to implement carrier serving areas ("CSAs"), which effectively shorten copper loop lengths and permit BellSouth to provide DSL to customers served in those areas.[5] BellSouth thus is using universal service fund money to wall off an expanding base of DSL customers from local voice competition. To make matters worse, under the *Triennial Review Order*, CLECs would be limited to using the narrow band portions of these CSA loops, which would effectively prevent CLECs from providing these customers with their own DSL service.[6] If BellSouth's practice were allowed to stand, therefore, CLECs would have no way to compete for these customers' local voice business because BellSouth would not allow customers to retain

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1996, Order on Complaint, p. 14, Docket No. 11901-U (2003) ("Georgia DSL Order") (attached hereto as Attachment 1).

[5] By letters in Docket No. 25980 dated May 17, 2001; May 3, 2002; May 9, 2003; and May 6, 2004, BellSouth has requested that it be permitted to use a total of $66.4 million of the federal high-cost universal service support for CSA development. The Commission has approved all the requests except for the pending request that would allocate $14.4 million for CSA development for 2005.

[6] Even if spare copper is available to CLECs, in many if not most cases, they will not be able to use the spare copper to provide DSL because of loop length, which is the reason BellSouth replaced the copper feeder with CSA arrangements in the first place.

their DSL while receiving UNE-P service, and the CLECs would have no way of providing DSL service themselves over loops leased from BellSouth.

Several other commissions in the Southeast have rejected BellSouth's DSL practice as anticompetitive. Most recently, the Georgia Public Service Commission ruled that the practice violates Georgia law preventing tying and other anticompetitive conduct and also violates contractual provisions requiring BellSouth to provide UNEs on a nondiscriminatory basis. Georgia DSL Order, pp. 5-19. Likewise, the Louisiana Public Service Commission ruled that BellSouth would be required to provide its DSL service over CLEC UNE-P loops.[7] There the Commission stated that "the Commission's policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive [e]ffects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited." Louisiana DSL Order, p. 6. In the Louisiana Commission's Clarification Order issued in the same docket, the Commission stated that its order applies to customers receiving UNE-P service, regardless of whether the customer has FastAccess or DSL service from an ISP carrier using BellSouth's wholesale DSL product, and regardless of whether the customer obtains DSL service before or after migrating the voice service to the CLEC.[8] Indeed, BellSouth already has implemented a method by which it provides FastAccess to UNE-P customers in Louisiana. BellSouth should be required to undertake the same measures in Alabama. The Florida Public Service Commission also has found BellSouth's DSL practice unlawful.[9]

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[7] *In re: BellSouth's provision of ADSL service to end-users over CLEC loops Pursuant to the Commission's directive in Order U-22252-E*, Order No. R-26173, Docket R-26173 (Jan. 24, 2003) ("Louisiana DSL Order").

[8] *In re: BellSouth's provision of ADSL service to end-users over CLEC loops Pursuant to the Commission's directive in Order U-22252-E*, Order No. R-26173-A, Docket R-26173 (April 4, 2003).

[9] *See In re: Petition by Florida Digital Network, Inc. for arbitration or certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the*

This Commission should reach the same conclusion as the Georgia, Louisiana and Florida commissions and find that BellSouth's DSL practice is anticompetitive and unlawful.

III. THE MAJORITY'S RECOMMENDATION IS ERRONEOUS

The majority premised its decision on three faulty grounds: (1) this Commission's alleged lack of authority to address BellSouth's DSL practice; (2) the ability of CLEC resale customers to use BellSouth's DSL service; and (3) a policy of encouraging CLECs to offer their own DSL service. None of these purported justifications can support BellSouth's practice.

A. The Commission Has the Authority to Make BellSouth End Its DSL Practice

The majority asserts that decisions of the FCC have acknowledged BellSouth's practice without striking it down, and that this Commission lacks jurisdiction to address BellSouth's retail DSL service because it is an information service and the Commission lacks jurisdiction over the wholesale component of BellSouth's DSL service because it is an interstate telecommunications service. These arguments flatly contradict the Comments filed by this Commission at the FCC less than four months ago. There, this Commission stated:

> The Alabama Public Service Commission opposes BellSouth's petition for a Declaratory Ruling that State Commissions may not regulate broadband internet services by requiring BellSouth to provide such services to CLEC voice Customers. The APSC asserts that the State Commissions have the

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Telecommunications Act of 1996, Final Order on Arbitration, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP (Florida Public Service Commission, June 5, 2002) (in arbitration case, holding that "in the interest of promoting competition in accordance with state and federal law, BellSouth shall continue to provide FastAccess even when BellSouth is no longer the voice provider because the underlying purpose of such a requirement is to encourage competition in the local exchange telecommunications market, which is consistent with Section 251 of the Act and with Chapter 364, Florida Statutes"). *See also In re Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc Pursuant to U S C Section 252*, Order, Case No. 2001-00432 (Kentucky Public Service Commission, October 15, 2002) (requiring BellSouth to provide DSL service to requesting ISPs when the end user customer chooses a UNE-P CLEC).

> authority and mandate to insure that competitive choices remain available to the local service customers. A state requiring an incumbent local exchange carrier (ILEC) to provide DSL service to customers who choose[] to obtain local voice service from another carrier does not impose state regulation on interstate information services. It protects the ability of consumers to make choices about their local service provider.

APSC Comments, pp. 1-2. This Commission went on to state that "[c]ontrary to BellSouth's claim, the state Commission orders protecting their local customers' rights to choice among local voice carriers violates no federal law or FCC policy." *Id* at 2. The Commission also observed that four other state commissions had determined they had jurisdiction to address BellSouth's DSL practice, and one of those decisions has been upheld by a federal court. *Id.* at 2-3.[10]

The Commission penned its Comments *after* the 271 cases and the *Triennial Review Order* upon which the majority relies so heavily. For reasons that are difficult to fathom, the majority has simply ignored the clearly stated position of this Commission that state commissions have the authority to address BellSouth's practice. The Commission should adhere to its recently stated policy and reject the majority's recommendation to the contrary.

B. <u>BellSouth's Offer to Permit DSL Customers to Be Served Over Resale Lines Does Not Excuse BellSouth's Policy</u>

BellSouth's willingness to provide DSL service to CLEC resale customers does not vitiate the anticompetitive nature of its DSL practice. The reality, as BellSouth well knows, is that resale has not been used successfully on a mass market basis anywhere in the United States, and certainly not in Alabama. As the Georgia Commission stated:

> MCI's testimony that resale is not a viable option is persuasive. The testimony concerning the failure of entrants into the resale

[10] CLECs in the FCC proceeding also addressed the arguments that state commissions were powerless to deal with BellSouth's practice. MCI, for example, filed initial comments on January 30, 2004 that rebutted BellSouth's (and the majority's) arguments in detail. These comments are attached hereto as Attachment 2.

> market and the general direction of the resale business explains MCI's reluctance to rely upon reselling BellSouth's voice service as a solution to its problem. [Consumer Utility Counsel] is correct that the record reflects that ... UNE-P has been responsible for successes in residential competition in Georgia.

Georgia DSL Order, p. 9. In proposing to provide DSL to resale customers, BellSouth is offering the sleeves out of its vest, knowing that resale does not provide a practical service delivery method for mass-market customers. The availability of resale does nothing to diminish the anticompetitive and discriminatory nature of BellSouth's DSL practice.

C. <u>BellSouth Should Not Be Excused from Providing DSL Service to UNE-P Customers on the Theory that CLECs Should Provide DSL Service Themselves</u>

Aided in large measure by huge infusions of federal universal service fund cash, BellSouth has been the only player that has rolled out DSL on a broad scale to the Alabama mass market. BellSouth's dominance in the Alabama DSL market demonstrates the comparative difficulty that other carriers have had in trying to break into that market. Of course, attempting to enter BellSouth's voice monopoly market while at the same time seeking to enter the DSL market only compounds the problem that would-be competitors face. It is therefore not surprising that BellSouth has tried to deflect attention from its DSL practice by attempting to shift the blame to CLECs, contending that they are at fault for not offering their own competing DSL service.

But CLECs, who have not been granted tens of millions of dollars to assist in their broadband deployment, are at a disadvantage when it comes to rolling out DSL. As the Georgia Commission observed, "the record reflects that BellSouth maintained a distinct advantage over its competitors in building a DSL network in Georgia as a result of its position as the incumbent local exchange carrier and monopoly provider of voice service. . . .The record demonstrates that BellSouth has a large majority of the DSL customers in Georgia, and . . . that BellSouth possesses market power in Georgia's high speed internet market." Georgia DSL Order, p. 6. The existence of competing DSL providers does not change the anticompetitive effect of BellSouth's DSL practice, given the current reality of the Alabama market. CLECs lack BellSouth's built-in advantages and are not in a position to offer DSL on the same scope and scale as BellSouth. Even as CLECs begin to offer DSL service in Alabama, BellSouth's DSL practice will continue to deny Alabama consumers choice in their local provider and to inhibit the growth of local competition. The emergence of DSL competitors will not help consumers who prefer the features of BellSouth's DSL service but would like to choose a CLEC's voice offerings. Even if DSL competitors exist, consumers still may want to retain BellSouth's DSL service, while migrating their voice service to the CLEC, because changing DSL providers involves more time, effort and expense than the consumers wish expend. And consumers that are in CSAs or otherwise outside CLECs' smaller DSL footprints will continue to have no choice in their DSL carrier. In short, many consumers will be locked into BellSouth's voice product unless BellSouth's DSL practice is changed.[11]

Reduced to its essence, BellSouth's (and the majority's) position is that Alabama consumers should be denied choice in their local voice service provider *now* because there is potential in the *future* that DSL will be widely available to consumers from a number of sources. But the day when DSL has become so widespread has not arrived, and from today's vantage point that day is not even on the horizon. The Commission should make its decision based on the current reality that BellSouth has a commanding position in DSL service in this state, with very little competition emerging to date. In today's market, BellSouth's DSL practice is

[11] As a senior BellSouth representative told an equity market analyst: "Essentially, it's a huge disincentive for customers to use a CLEC for voice if they are not able to use our DSL service." Medley Global Advisors, Equity Brief, *BellSouth. DSL/Voice Bundling Faces Regulatory Obstacles* (Jan. 14, 2004) at 3.

anticompetitive, discriminatory and harmful to Alabama consumers. The lack of DSL competition is not a reason to uphold BellSouth's anticompetitive DSL practice, but rather a reason the Commission should strike it down.

IV. CONCLUSION

For the foregoing reasons, BellSouth should be required to terminate its DSL practice. BellSouth should be required to permit its retail and wholesale DSL customers to receive local UNE-P voice service from CLECs, regardless of whether the customer had BellSouth's DSL service when it migrated to the CLEC or seeks to obtain the service after migration. Further, BellSouth should be prohibited from charging different prices to its DSL customers based on whom the customer selects as its local voice carrier. Adopting this new policy will promote local competition in Alabama and provide Alabama consumers the choices they deserve.

Respectfully submitted this 17th day of May, 2004.

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(334) 834-6500

Attorney for the Competitive
Carriers of the South, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the following individuals in this cause by placing the same in the U.S. Mail, postage prepaid and properly addressed this 17th day of May 2004.

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OF COUNSEL

DOCKET NO. 11901-U

In Re: **Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996.**

ORDER ON COMPLAINT

BY THE COMMISSION:

On April 29, 2002, MCImetro Access Transmission Services and MCI WorldCom Communications, Inc. (collectively "MCI") filed with the Georgia Public Service Commission ("Commission") a Complaint against BellSouth Telecommunications, Inc ("BellSouth"). MCI claimed that BellSouth was refusing to provide its digital subscriber line ("DSL") service, known as "FastAccess," to MCI users over the high frequency portion of their telephone lines. (MCI Complaint, p. 1). MCI requested that the Commission order BellSouth to discontinue this practice and to permit MCI to provide what is known as UNE-P[1] voice over the same lines over which BellSouth provides its DSL service. Id. at 8.

I. JURISDICTION AND PROCEEDINGS

A. Jurisdiction

The Commission has general jurisdiction over this matter pursuant to O.C.G.A. §§ 46-2-20(a) and (b), which vests the Commission with authority over all telecommunications carriers in Georgia. O.C.G.A. § 46-5-168 vests the Commission with jurisdiction in specific cases in order to implement and administer the provisions of the State Act. The Commission also has jurisdiction pursuant to Section 252 of the Federal Telecommunications Act of 1996 ("Federal Act"). Since the Interconnection Agreement between the parties was approved by Order of the Commission on December

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[1] "UNE-P" stands for unbundled network element – platform The term describes when UNEs are combined into a complete set in order to provide an end-to-end circuit.

14, 2001, a Complaint that a party is in violation of the Agreement equates to a claim that a party is out of compliance with a Commission Order. The Commission is authorized to enforce, and to ensure compliance with its orders pursuant to O.C.G.A. Sections 46-2-20(b), 46-2-91 and 46-5-169. The Commission has enforcement power and has an interest in ensuring that its Orders are upheld and enforced. Campaign for a Prosperous Georgia v. Georgia Power Company, 174 Ga. App. 263, 264, 329 S.E.2d 570 (1985).

BellSouth raised arguments that the Commission did not have jurisdiction to grant the relief sought by MCI in this docket. First, BellSouth argued that the Commission does not have authority to grant the complaint because its DSL service is a non-regulated enhanced service that is not within the jurisdiction of this Commission. (BellSouth Brief, p. 6). This argument misconstrues the nature of the alleged harm and the action MCI requests that the Commission take. MCI's claim is that BellSouth refuses to provide its DSL service to MCI voice customers. This alleged practice would impact local voice competition. A situation in which a voice customer receives a benefit for receiving service with one provider, or conversely, is punished for receiving voice service from another, has a foreseeable impact on that customer's choice of provider. The Commission's jurisdiction over local competition has not been questioned. The Commission has the authority "necessary to implement and administer the express provisions of [the State Act] through rule-making proceedings and orders in specific cases." O.C.G.A. § 46-5-168(a). MCI has raised in its complaint a specific provision of the State Act that prohibits companies electing alternative regulation from engaging in "any anticompetitive act or practice including but not limited to price squeezing, price discrimination, predatory pricing, or tying arrangements, as such terms are commonly applied in antitrust law." O.C.G.A. § 46-5-169(4). The issues raised in the Complaint are well within the Commission's jurisdiction

BellSouth also argues that the relief sought by MCI is inconsistent with its Federal Communications Commission ("FCC") Tariff No. 1, ¶7.217(A). (BellSouth Brief, p. 6). MCI counters that the tariff was not entitled to deference because BellSouth filed the tariff in its discretion. (MCI Brief, p. 24). BellSouth argues that its tariff "requires the existence of an 'in-service, Telephone Company [i.e., BellSouth] provided exchange line facility.'" (BellSouth Brief, p. 6 quoting BellSouth FCC Tariff No. 1, ¶7.217(A)). MCI notes that the tariff defines "in-service exchange line facility as 'the serving Central Office line equipment and all the plant facilities up to and including the Telephone Company-provided Network Interface Device (NID).'" (MCI Brief, p. 24, quoting BellSouth FCC Tariff No. 1 ¶7.217). MCI concludes that UNE-P fits into this category because "BellSouth is the wholesale provider of UNE-P facilities and a UNE-P arrangement includes the Central Office line equipment and all the plant facilities up to and including the NID." Id.

BellSouth's argument is that its FCC tariff preempts the Commission from granting the relief requested because it construes the tariff to prohibit MCI from providing voice service over the same line that it provides DSL service. The touchstone of any preemption analysis is Congressional purpose. *See,* Oxygenated Fuels Association

Incorporated v. Gray Davis, 331 F.3d 665, 668 (9th Cir. 2003). That BellSouth drafted this tariff impacts the analysis of whether the FCC intended to prohibit this practice, or whether the FCC in approving this language did not identify the issue that BellSouth argues before this Commission. This distinction is highlighted by the cross-examination of BellSouth witness, Joseph Ruscilli, on BellSouth's FCC tariff.

> Q (MCI Counsel) Now one thing about this language is that it describes what BellSouth contemplates with respect to the design, maintenance and operation of its ADSL service; not what is required, correct?
>
> A (Mr. Ruscilli) Well, yes and no. I wrote tariffs for a period of time for BellSouth and for its long distance company. What this is telling you, and if you read a little bit prior to it where it talks about the overlay, is that the design of this tariff is built around this set of assumptions. That is, it's contemplating that this is an in-serve telecommunications telephone company provided line and that you've got these kinds of circuits and then as you drive through the tariff, you're this kind of provider and you can handle this many lines and expertise. So it's outlining in general terms, *when we designed this tariff, this is what we were thinking of doing*

(Tr. 312). (emphasis added).

The Commission is unwilling to read into BellSouth's FCC tariff meaning that is not apparent from the language of the tariff itself. For BellSouth to prevail on a preemption argument based on what it claims to have intended when it drafted the language of a tariff that the FCC later approved is unfair to other parties. The relevant question is what the FCC intended in approving the tariff. In its effort to discern the intent of the FCC in approving BellSouth's tariff, the Commission will limit its analysis to the actual language of the tariff.

In order to find preemption, there must either be "express preemption," in which the intent to preempt state law is explicitly stated, "field preemption," in which federal regulation is pervasive to the degree that the intent to occupy the field exclusively may be inferred, or "conflict preemption," in which it is impossible to comply with both state and federal law. Lewis v. Brunswick Corp., 107 F.3d 1494, at 1500 (11th Cir. 1996). BellSouth's apparent argument is that the last of these three, conflict preemption, prevents this Commission from ordering BellSouth to discontinue the complained of practice. However, BellSouth has failed to rebut the explanation offered by MCI as to why no conflict exists. Even under BellSouth's construction of the tariff, all that is required on this issue is for the end-user to be served by an existing, in-service Telephone Company provided exchange line facility. The UNE-P arrangement that BellSouth provides to MCI meets the tariff's definition of an in-service exchange line facility. The tariff does not state that the customer cannot receive service from an exchange line facility that BellSouth provides at the wholesale level to a competitive local exchange carrier.

For the reasons stated above, the Commission finds that it has jurisdiction to grant the relief sought in this docket.

B. Proceedings

This proceeding was initiated on April 29, 2002 when MCI filed a Complaint against BellSouth. MCI's complaint included two counts. The first count charged that BellSouth's practice violated the nondiscriminatory provisions in the parties' interconnection agreements. Id. ¶¶15-19. The two interconnection agreements in question are identical in all material respects, except that one is signed by MCImetro and the other is signed by MCI WorldCom. Id. at ¶16. The second count charged that BellSouth's practice violated the Telecommunications and Competition Development Act of 1995, O.C.G.A. § 46-5-160, et seq. (the "State Act"), specifically O.C.G.A. § 46-5-169(4), which prohibits BellSouth from engaging in "any anticompetitive act or practice including but not limited to price squeezing, price discrimination, predatory pricing, or tying arrangements, as such terms are commonly applied in antitrust law." Id. at ¶¶20-21. MCI requested that the Commission order BellSouth to stop refusing to provide FastAccess to MCI voice customers over the high frequency portion of their voice lines, to order BellSouth to permit MCI to provide UNE-P voice service over the same lines BellSouth uses to provide FastAccess service, and to order such further relief as the Commission deems just and appropriate. Id. at p. 8. On May 29, 2002, BellSouth filed its Answer to the Complaint. In its Answer, BellSouth contended that MCI's policy was both factually and legally flawed. (BellSouth Answer, p. 1). Further, BellSouth claimed that its policy was consistent with both state and federal law. Id.

The Commission assigned the matter to a Hearing Officer on July 23, 2002. On August 22, 2002, the Hearing Officer entered a Consent Schedule addressing discovery and the filing of pre-filed testimony. Finding that the Complaint raised issues of significant policy importance, the Commission issued an order on September 13, 2002 stating that the full Commission would hear the matter. On October 17, 2002, AT&T Communications of the Southern States, LLC petitioned for intervention in the docket.

On February 10-11, 2003, the Commission held hearings on MCI's complaint. The Commission heard argument of counsel and testimony from witnesses. BellSouth, MCI and the Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs ("CUC") submitted briefs on April 11, 2003. The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. COUNT 1: VIOLATION OF INTERCONNECTION AGREEMENTS

In its Complaint, MCI referenced provisions of the parties' interconnection agreements that it charged BellSouth's policy violated. (MCI Complaint, ¶¶ 17-18).

> BellSouth agrees that it shall provide to MCIm on a nondiscriminatory basis unbundled Network Elements and auxiliary services as set forth in this Agreement . . . . BellSouth further agrees that these services, or their functional components, must contain all the same features, functions and capabilities and be provided at a level of quality at least equal to the level which it provides to itself, its Affiliates, and other telecommunications carriers.

Interconnection Agreements, Part A, Section 12.2.

> BellSouth shall offer Network elements to MCIm on an unbundled basis at rates and on terms and conditions that are just, reasonable, and nondiscriminatory and in accordance with the terms and conditions of this Agreement. BellSouth shall provide MCIm with unbundled Network Elements of at least the same level of quality as BellSouth provides itself, its Customers, subsidiaries, or Affiliates, or any third party.

Interconnection Agreements, Attachment 3, Section 2.1.

MCI argues that BellSouth's policy is discriminatory in violation of the parties' interconnection agreements because BellSouth provides FastAccess over its own loops but not those leased to MCI. (MCI Brief, p. 20). MCI also claims a violation of Attachment 3, Section 2.1 because under its policy BellSouth does not provide MCI UNE-P loops that are "of at least the same level of quality as BellSouth provides itself, its Customers, subsidiaries, or Affiliates, or any third party." Id. The unbundled network element in question in this Complaint is the line that MCI leases from BellSouth. In accordance with the parties' interconnection agreements, BellSouth must provide the line to MCI on a nondiscriminatory basis. It is undisputed that under BellSouth's policy an MCI voice customer cannot receive BellSouth's service; whereas a BellSouth voice customer may receive this service. Discrimination is not only present in this policy, but discrimination is the policy. Precisely because it is a line leased by MCI to serve an MCI voice customer, BellSouth will not allow its DSL service to be provided over the line.

BellSouth responds with two independent arguments for why its policy does not violate Part A Section 12.2 of the Interconnection Agreements. First, BellSouth argues that BellSouth and MCI voice customers are not similarly situated because BellSouth customers are served over a line owned by BellSouth and MCI customers are served by a line leased from BellSouth by MCI. (BellSouth Brief, p. 34). BellSouth argues that the relevance of this distinction is that MCI determines the services to offer on the line that it leases from BellSouth. Id. In essence, BellSouth defends this practice, even if it involves discrimination, because it claims that the groups of customers involved are not similarly situated. For an argument that discrimination is justified because the discrimination does not occur between those similarly situated, the distinction cited must be relevant. *See, e.g.*, Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996); Young v. Alongi, 123 Ore. App. 74 (1993); Estate of Antonios Legatos v. Bank of California, 1 Cal. App. 3d 657 (1969). The distinction BellSouth relies upon is that the customers that cannot receive BellSouth's DSL service receive voice service via a line leased by MCI, and that therefore, MCI makes the decision of what services can be offered over the line. (BellSouth Brief, p. 14). Of course, by virtue of BellSouth's policy MCI cannot choose to have BellSouth's DSL served over its line. This point alone is sufficient to demonstrate that BellSouth's distinction is not relevant. It does not matter that MCI leases the line if BellSouth can still prevent MCI voice customers from receiving the same services that BellSouth's voice customers can.

Moreover, the record reflects that BellSouth maintained a distinct advantage over its competitors in building a DSL network in Georgia as a result of its position as the incumbent local exchange carrier and monopoly provider of voice service. (Tr. 165). The record demonstrates that BellSouth has a large majority of the DSL customers in Georgia, and, as will be discussed in detail later, that BellSouth possesses market power in Georgia's high speed internet market. (MCI Exhibit 5, BellSouth Trade Secret Exhibit 14). To be clear, it is not necessary for the purposes of finding BellSouth in violation of its interconnection agreements with MCI to determine that BellSouth has market power in the relevant market. However, independent of any market power analysis, consideration of BellSouth's substantial presence in the high speed internet market emphasizes that the distinction that BellSouth tries to draw to evade a claim that its policy is discriminatory is not relevant. As stated above, that it is BellSouth's decision, and not MCI's, to deprive MCI voice customers of the option of DSL makes the distinction that MCI leases the line irrelevant. That BellSouth is the overwhelming choice for those customers who wish to select DSL service merely demonstrates the degree to which BellSouth's policy is discriminatory.

BellSouth's second argument pertains to decisions of the FCC. BellSouth first cites to the FCC order that approved BellSouth's Louisiana/Georgia Section 271 Application. The FCC stated that "under [its] rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities." *In Re: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35 (May 15, 2002) ("GA/LA 271 Order") ¶157. The FCC states further that it did not find discriminatory BellSouth's policy of not offering its wholesale DSL service to an ISP or other network services provider on a line provided over UNE-P. Id. The FCC reached much the same finding in the context of BellSouth's 271 application for Alabama, Kentucky, Mississippi, North Carolina, and South Carolina. *See,* Memorandum Opinion and Order, *In re: Joint Application by BellSouth*

Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, WC Docket No. 02-150, FCC 02-260, ¶164 (September 18, 2002).

Both FCC orders state that its rules do not prohibit BellSouth's practice. MCI's Complaint does not charge that BellSouth's practice has violated FCC rules. MCI's Complaint states that BellSouth's policy violates the parties' interconnection agreements and Georgia state law. The FCC did not address those issues and therefore its orders have little if any bearing on the Commission's decision in this docket. As to the FCC's statements that BellSouth's policy is not discriminatory, these findings did not stem from a complaint interpreting an interconnection agreement between the parties, but rather BellSouth's application for authority to provide long-distance services. Examining BellSouth for checklist compliance in a 271 proceeding is meaningfully different than consideration of a complaint that BellSouth is violating an interconnection agreement with a competitor. Moreover, the evidence presented to the Commission in this proceeding was not identical to what was presented to the FCC in its review of BellSouth's 271 applications. In fact, the FCC did not hold an evidentiary hearing on this issue. (MCI Brief, p. 25). Finally, the FCC decision was a snapshot in time and did not indicate that the policies considered permissible for BellSouth to meet its obligations would never change. In sum, to argue that the Commission is precluded from finding BellSouth's policy discriminatory in violation of the parties' interconnection agreement would be to conclude that no matter what evidence was presented in this docket BellSouth would prevail on this issue. That is not a reasonable conclusion, and it is not an intent that can reasonably construed from the FCC's 271 orders.

B. COUNT 2: VIOLATION OF STATE LAW

MCI's second count charges that BellSouth's policy violates the State Act, specifically O.C.G.A. § 46-5-169(4).

This statute provides that:

> A company electing alternative regulation shall not, either directly or through affiliated companies, engage in any anticompetitive act or practice including but not limited to price squeezing, price discrimination, predatory pricing, or tying arrangements, as such terms are commonly applied in antitrust law.

MCI alleges that BellSouth's conduct violates both the prohibition against tying arrangements and anticompetitive acts or practices in general. The Commission will take these claims up separately.

1. Tying Arrangement

In prohibiting companies that elect alternative regulation from engaging in tying arrangements, O.C.G.A. § 46-5-169(4) states that this term shall be construed consistent with its application in antitrust law. Tying arrangements coerce the "abdication of a buyer's independent judgment" with respect to the desirability of the tied product. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 604 (1953). In doing this, tying arrangements insulate the tied product from competition. Id. For these reasons, tying arrangements do not fare well under laws prohibiting restraints of trade. Id. at 605. Not every refusal to sell two products separately constitutes an antitrust violation. The United States Supreme Court has held that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984). For guidance in determining when such an invalid tying arrangement exists, courts have required that in order to establish an unlawful tying arrangement, plaintiffs must demonstrate the existence of the following four elements: "1) that there are two separate products, a 'tying' product and a 'tied' product; 2) that those products are in fact 'tied' together -- that is, the buyer was forced to buy the tied product to get the tying product; 3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and 4) involvement of a 'not insubstantial' amount of interstate commerce in the market of the tied product." Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d. 1407, 1414 (11th Cir. 1987).

Turning to the first component, the tied product is the product that the seller must purchase if the seller wants to be able to purchase the tying product. MCI demonstrated the tied product is BellSouth's voice service and the tying product is BellSouth's DSL service. (Tr. 38-39). BellSouth argues that MCI's tying claim is backwards. That is, BellSouth argues that for the tying claim to be illegal it would have to be requiring customers to purchase its DSL service in order to receive its voice service. (BellSouth Brief, p. 39-40). This claim is addressed in detail in the discussion of market power below.

The second criterion involves whether BellSouth's policy forces customers to purchase BellSouth's voice service in order to receive BellSouth's DSL service. BellSouth disputes that MCI has established this component. BellSouth argues that MCI can resell BellSouth's voice service to a BellSouth DSL customer. (Tr. 17-18). MCI responds that the resale option is not a realistic option. Counsel for MCI argued that, "Resale has never been used effectively to serve residential customers on a mass market basis. It failed everywhere it was tried on a mass market basis." (Tr. 10). Further, MCI's witness, Sherry Lichtenberg, testified that the companies that have tried to mass market resale have either gone out of business or discontinued that strategy. (Tr. 120). In addition, Mr. Gillan testified that in light of the "death spiral" that the resale industry was undergoing it was not worth re-examining its viability. (Tr. 183). Mr. Gillan testified further that resale was fundamentally flawed because it attempted to make the entrant develop a cost structure reflective of the incumbent local exchange company's cost structure. (Tr. 184). CUC agrees with MCI that reselling BellSouth's voice service, and providing BellSouth's DSL as an overlay to that resold service is not a viable option. (CUC Brief, pp. 6-7). CUC argues that the record in this docket reflects that UNE-P, and not resale, has been responsible for the growth in residential competition. Id. at 7. BellSouth responds that the financial barriers for resale would not be the same given that MCI would not have to offer it to a large percentage of its customers. (Tr. 249).

An initial question is whether the viability of an option should be considered in this analysis. The Commission concludes that it must consider the viability of the resale option. Hypothetically, if it was universally agreed upon that success in resale was an absolute impossibility, it would make no sense to hold it out as an alternative worthy of defeating any tying claim. An unrealistic option does not reduce the risk of harm. The question then becomes whether the evidence demonstrated that resale was not a viable option. MCI's testimony that resale is not a viable option is persuasive. The testimony concerning the failure of entrants into the resale market and the general direction of the resale business explains MCI's reluctance to rely upon reselling BellSouth's voice service as a solution to its problem. CUC is correct that the record reflects that it has been UNE-P has been responsible for successes in residential competition in Georgia. In fact, this conclusion can be gleaned from the testimony of BellSouth as well as MCI. (Tr. 161-162, 296). As previously stated, the second component of an illegal tying arrangement is to force a buyer to purchase one service in order to receive the other service. If the only condition under which this coercion can be avoided requires an imprudent business decision, such as investing in a strategy that promises a remote chance for success, then in all likelihood the coercion will occur. It is unreasonable to blame MCI for not pursuing an option that has been shown to lack viability.

Independent of the rationale that resale is not a viable option, and perhaps more fundamental to a tying analysis, the resale option still involves BellSouth's voice service. In explaining the resale alternative to UNE-P, counsel for BellSouth stated that "MCI could resell BellSouth's voice service." (Tr. 18). Therefore, BellSouth's voice and DSL services would still be tied even if MCI were to pursue this option. To determine the significance of BellSouth allowing the resale option in conjunction with the provisioning of its DSL service, it is necessary to examine the differences between UNE-P and resale. UNE-P involves a CLEC purchasing network components and developing its own configuration to provision its own service. Resale involves a CLEC purchasing BellSouth's service and putting its name on it in place of BellSouth's. In addition, the resale discount is determined under the FCC's avoided cost methodology. This avoided cost methodology means that the incumbent's monopoly profit is not impacted.

That MCI can resell BellSouth's service to a BellSouth DSL customer does not excuse the packaging from the tying analysis. To conclude otherwise would be to state that as long as a company superficially conceals its tying arrangement, then no illegal tying has taken place. The resale option does not change that a customer must still purchase BellSouth's voice service to receive BellSouth's DSL service. Because the resale discount is based on BellSouth's avoided costs, that BellSouth is willing to provide

DSL to a resale customer does not change that before BellSouth will allow a customer to receive its DSL service it requires that it receive its monopoly profit from that customer's voice service. For both of the reasons stated above, the Commission determines that the second component of an illegal tying arrangement has been satisfied.

The third component is that the seller has sufficient economic power in the tying product market to coerce buyer acceptance of the tied product. A major point of contention between the parties relating to whether BellSouth's policy constitutes an illegal tying arrangement is whether MCI must demonstrate market power. MCI argues that it is not necessary to demonstrate market power in order to show that BellSouth's policy represents an illegal tying arrangement. (MCI Brief, p. 17). However, MCI maintains that the evidence in this proceeding demonstrates that BellSouth does have market power in the appropriate market. Id. For the purposes of this analysis, the Commission will assume that it is necessary to demonstrate market power in the relevant market.

The first step in resolving whether this element exists is to identify the tying product market. MCI states should the Commission determine that a showing of market power is necessary the market in question is the DSL market in BellSouth's Georgia territory. (MCI Brief, pp. 17-18). MCI explains that that the other options for high speed access to the internet involve "significantly different features." Id. at 18. MCI also cites to the testimony of BellSouth witness, Bill Smith, for the proposition that a substantial number of Georgia customers have access to BellSouth's DSL service and not to cable broadband. Id. at FN 18. Finally, MCI argues that the considerable success that DSL has had in Georgia in comparison to broadband indicates that the services are significantly different. Id. at 18.

BellSouth claims that MCI has not identified the proper market. (BellSouth Brief, pp. 40-43). BellSouth argues that the DSL market is not a market within itself because there are functional substitutes for this service. Id. at 41. BellSouth further argues that other means of internet access may lure customers away from its DSL service. Id. BellSouth specifically cites to cable modem service, satellite and wireless. Id. at 42. Finally, BellSouth references the dial-up service alternative to broadband service. Id. at 43.

Identifying the proper market is a question of fact. "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484 (9th Cir. 1991). For antitrust purposes, defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." Thurman Indus. v. Pay 'N Pak Stores, Inc. 875 F.2d 1369, 1374 (9th Cir. 1989) (citing Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1392-93 (9th Cir.), *cert. denied*, 469 U.S. 990, 83 L. Ed. 2d 331, 105 S.Ct. 397 (1984)). Relevant factors to consider in defining the boundaries of a submarket include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Brown Shoe Company v. United States, 370 U.S. 294, 325 (1962).[2]

Dial up internet service has different characteristics than high speed internet service. Customers of dial-up service must either incur the expense of an additional line or undergo the considerable inconvenience of not being able to use their internet and phone service at the same time. In addition, the quality of DSL is materially superior to that of dial-up service. Also, dial up service is less expensive than high speed internet. Given these substantial distinctions, it is unlikely that customers interested in, or already receiving, DSL service may be persuaded to settle for, or return to, dial-up service. It is a policy question as to how the Commission must weigh the factors in order to define the relevant market. Because of the differences in characteristics, price and customers between dial up service and high speed internet service, the Commission concludes that dial up service does not have the actual or potential ability to deprive high speed internet providers of significant levels of business. Therefore, the Commission finds that the relevant market for evaluating whether BellSouth has market power should not include dial up service.

The differences between DSL and other forms of high speed internet access are not substantial enough to warrant defining DSL as its own market. The Commission finds that the appropriate market to examine is the high speed internet market.

The next step in determining whether BellSouth has sufficient economic power is to examine what it means to have such power. An illegal tying arrangement involves the ability to force a customer into buying a product or service that the customer does not want or would have preferred to purchase elsewhere. Jefferson Parish Hospital District No. 2 et al v. Hyde, 466 U.S. 2 (1984). BellSouth has argued that in order to have market power a company must possess a fifty percent share of the relevant market. (BellSouth Brief, p. 45). For support of this position, BellSouth cites to the eleventh circuit decision in Bailey v. Allgas, Inc., 284 F.3d 1237 (11th Cir. 2000). However, the Bailey court states that "a market share at or less than 50% is inadequate as a matter of law to constitute *monopoly* power." Bailey, at 1250. (emphasis added). It is not necessary to demonstrate monopoly power or even a dominant position throughout the market for there to be sufficient economic power with respect to a tying claim. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969) Therefore, the decision in Bailey does not require that MCI demonstrate that BellSouth possesses a fifty percent share of the high speed internet market in Georgia.

BellSouth also relies upon Rebel Oil Company v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995). As in Bailey, the Rebel Oil Court holds that numerous cases have

[2] While Brown Shoe involved a vertical merger case, the issue of defining the relevant market is comparable and those same or substantially similar considerations have been employed in tying cases. See E.T. Barwick Industries, Inc. v. Walter E. Heller & Co., 692 F. Supp. 1331 (N.D.Ga. 1987); White & White, Inc. v. American Hospital Supply Corp., 723 F.2d 495 (6th Cir. 1983); Heatransfer Corp. v. Volkswagenwerk, A. G., 553 F.2d 964 (5th Cir. 1977)

held that a market share of less than fifty percent is presumptively insufficient when addressing claims of *actual monopolization*. Rebel Oil, at 1438. (emphasis added). The Court continues that courts have found a thirty percent market share to be insufficient to establish market power in an attempted monopoly case. Id. This observation has been made by other courts as well. *See, e.g.*, Commercial Data Servers, Inc. v. IBM, 262 F. Supp. 2d 50, 74, (S.D.N.Y. 2003); Sea-Land Serv. v. Atlantic Pac. Int'l, 61 F. Supp. 2d 1092, 1099 (D.Haw. 1999); Wilson v. Mobil Oil Corp., 940 F. Supp. 944, 949 (E.D.La. 1996). In Sea-Land, the Court determined that it was a question of fact for the jury whether a company with a thirty-three percent market share had market power. Sea-Land, at 1100. The Commission finds that the Rebel Oil decision does not indicate that the benchmark for determining market power in this docket should be a fifty percent market share. The Commission will take guidance from other courts that a market share of thirty percent or less is presumptively not sufficient to demonstrate market power.

The first step in determining BellSouth's share of the high speed internet market in Georgia is to establish DSL's share of this market. This percentage together with determining BellSouth's share of the Georgia DSL lines will produce BellSouth's share of the high speed internet market in Georgia. As of December 2001, DSL maintained a 41.1 percent share of Georgia high speed lines. (MCI Exhibit 5). This figure compared to a 37.1 percent share for cable modems. Id.[3] BellSouth's percentage of the DSL market as of December 2001 was introduced into evidence as BellSouth's trade secret Exhibit 14. By taking BellSouth's percentage of the DSL lines in Georgia and multiplying that number by DSL's share of the high speed internet market, it is possible to determine BellSouth's percentage of the relevant market.[4] The result of this multiplication is a share that is significantly higher than thirty percent. By June of 2002, DSL's share of the high speed market had increased to 46.5 percent, and DSL had captured 71.1 percent of the growth within this market over the intervening six months. (MCI Exhibit 5). It is reasonable to conclude, although not required for the purpose of this showing, that given BellSouth's substantial majority of Georgia's DSL lines, BellSouth's share of the high speed internet market would have increased over the six month time period to an even higher percentage.

BellSouth criticized the FCC data on the grounds that it only addressed facilities-based providers and that the data is self-reported. (BellSouth Brief, p. 44). The discussion of the number of lines not reflected in the FCC Report focused upon general observations and did not include any specific numbers, or even ranges of numbers, as to how this alleged gap in the data may impact BellSouth's share of the market. (Tr. 337-338). While MCI has the burden in this docket, MCI met this burden as to this issue through the data on the number of DSL lines, as compared to cable lines, in Georgia and BellSouth's share of those lines. In rebutting this evidence, BellSouth must be required to do more than merely raise potential problems with the data without providing an idea

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[3] The source for the data on MCI's Exhibit 5 was FCC high speed internet access reports

[4] BellSouth's precise market share percentage of the high speed internet market for the time period discussed cannot be stated without revealing information from which it would be possible to calculate BellSouth's share of the DSL lines in Georgia. This percentage has been declared trade secret.

as to how or whether this potential problem would impact the question of whether it share is above a minimum threshold for a finding of market power. Moreover, given that BellSouth's share of the relevant market is significantly over thirty percent it is unlikely that the lines not included in the FCC data would impact the conclusion that BellSouth has an adequate market share to make it a question of fact as to whether it has market power. The Commission is similarly not persuaded by BellSouth's argument that the data is less reliable because it is self-reported. Reliance upon self-reported data is consistent with other telecommunication proceedings before the Commission, such as its generic cost dockets. The Commission concludes that BellSouth's share of the Georgia high speed internet access market is above the minimum threshold for a demonstration of market power.

A market share of greater than thirty percent does not translate uniformly to a showing of market power. Courts have identified other considerations that are relevant to the inquiry. The United States Supreme Court has held that "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977). MCI witness, Joseph Gillan testified that because of BellSouth's position as the incumbent it had an advantage in the DSL market over other competitive local exchange companies ("CLECs") in Georgia.

> Quite frankly, I think it's pretty obvious that the reason that BellSouth has a completely different DSL penetration than anyone else is the fact that they started out with this inherited position and that this DSL position -- true, they built it up, but they built it up as a compliment (sic) to a voice position that is an inheritance of prior government policy.
>
> So I think it's important that that explanation, that consumers are made better off because they deny it, other people go out and replicate this, is inherently false. Nobody has the Georgia market position that BellSouth has and to the extent they used that to develop their DSL footprint, which is their own testimony, then you shouldn't expect that somebody else is going to be able to put it together either.

(Tr. 165).

The above testimony accurately distinguishes between BellSouth's position and the position of CLECs. The Commission concludes that BellSouth did have an advantage over CLECs in establishing a DSL network and competing in the high speed internet market.

The Commission also finds that while high speed internet, and not DSL, is the relevant market, the Commission is not precluded from considering the evidence that illustrates the direction of the internet market in Georgia. The evidence indicates that DSL is capturing most of the growth in the high speed internet market. (MCI Exhibit 5). The Commission concludes from this evidence that BellSouth's power in having an overwhelming majority of the DSL lines in Georgia is greater than it would be if DSL was not expanding its lead over cable in the relevant market.

The Commission concludes for all of these reasons that BellSouth has market power in the Georgia high speed internet market.

The final element for an unlawful tying arrangement is to demonstrate "involvement of a 'not insubstantial' amount of interstate commerce in the market of the tied product." Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d. 1407, 1414 (11th Cir. 1987). As explained in Jefferson Parish, under an invalid tying arrangement, a buyer is coerced into making a decision that it would rather not make, including buying a product that the buyer would have preferred to purchase elsewhere on different terms. Jefferson Parish, 466 U.S. at 12. The United States Supreme Court has explained that in determining whether this criteria exists, "the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie." Fortner Enterprises, Inc., 394 U.S. at 501 (1969).

MCI provided evidence that it received more than 4,900 DSL rejects relating to more than 4,056 customer telephone numbers. (Tr. 38-39, 75). After BellSouth altered its systems, more than 2,000 DSL customers were migrated to MCI that previously would have been rejected and returned to BellSouth. (Tr. 59). In addition, MCI presented testimony that it informs potential customers that they cannot migrate to MCI if they wish to maintain their DSL service. (Tr. 26, 39). Therefore, in addition to the substantial number of customers that have actually been rejected, there are others that are informed on the front end of the problems with switching away from BellSouth's voice service. The Commission concludes that BellSouth's policy has a greater than *de minimis* impact, and involves a "not insubstantial" amount of interstate commerce.

BellSouth argues that MCI has not demonstrated that it has charged more for the services together than it could have if the services were sold separately. (BellSouth Brief, p. 46). The United States Supreme Court has held that the question is whether "the seller has the power to raise prices, *or impose other burdensome terms such as a tie-in*, with respect to any appreciable number of buyers within the market. Fortner Enterprises Inc., 394 U.S. at 504 (emphasis added). Customers that wish to select a different provider for local voice service are coerced to receive voice service from BellSouth because otherwise they will not be able to receive BellSouth's DSL service. These particular customers believe that voice service at MCI, instead of BellSouth, is the better deal. They are not able to take advantage of what they view as the better deal without losing their DSL service. This condition is the burdensome term referenced in Fortner. This condition also directly relates to the court's identification in Jefferson Parish of the "essential characteristic" of an invalid tying claim. The customer is coerced into buying a service that it "preferred to purchase elsewhere on different terms." Jefferson Parish, 466 U.S. at 12.

It is difficult to separate this coercion from the demonstration that a company has charged more for its tied products than it otherwise could. Presumably, a BellSouth customer would consider the price of the voice service when deciding which provider to select. There was no evidence that the customers that selected MCI, were rejected because they had BellSouth's DSL service and returned to BellSouth's voice service were offered any discount in their service to induce them to stay. Customers that did not want to purchase BellSouth's voice service at the price it was offered ended up doing just that because the customer did not want to lose its DSL service. A customer that receives voice service from BellSouth at a certain price only because it is tied to DSL service is paying BellSouth more than he or she would be willing to if not for the tying arrangement. If BellSouth offered voice service at that same price without the tying arrangement in place, the evidence shows that a significant number of customers would have chosen to receive voice service from MCI. This is not to say that price was the only factor that inspired the customer to choose MCI's voice service (it is not even to say that MCI's voice service was less expensive than BellSouth's), it is only to say that price is a factor in the selection process. Instead of offering a more competitively priced voice service to maintain its share of the local voice market, BellSouth's policy attempts to insulate its voice service from the competition that might drive prices down.

The purpose of such a policy can only be so that BellSouth can charge more for the services together than it could apart. The evidence indicates that it could not maintain the same number of voice customers at the price it charges for the service if the service was not tied to its DSL service.

For the reasons stated above, the Commission concludes that BellSouth's policy of requiring customers to receive its voice service in order to receive its DSL service constitutes an illegal tying arrangement in violation of O.C.G.A. § 46-5-169(4).

2. Anticompetitive Act or Practice

The second violation of the State Act alleged by MCI is that BellSouth's policy of requiring customers to purchase its voice service in order to receive its DSL service constitutes an anticompetitive act or practice in violation of O.C.G.A. § 46-5-169(4). This code section prohibits BellSouth from engaging in "any anticompetitive act or practice including but not limited to price squeezing, price discrimination, predatory pricing, or tying arrangements, as such terms are commonly applied in antitrust law." The tying arrangement is an example of a prohibited anticompetitive act; however, the statute makes clear that the expressly stated examples are not exhaustive of the types of activity that can be found to violate the statute. Therefore, even if this Commission had not found that BellSouth's policy constituted an unlawful tying arrangement as that term is commonly applied in antitrust law, the Commission could still conclude that the policy was anticompetitive in violation of this code section. The Georgia legislature has provided the Commission with discretion in interpreting what constitutes an anticompetitive act or practice for the purposes of this statute. Not all conduct that will benefit the incumbent provider or help the incumbent maintain its share of the local voice market is anticompetitive. For guidance, the Commission looks to how courts have explained the anticompetitive effects of invalid tying arrangements. If the tie is used to impair competition on the merits and insulate a potentially inferior product from competition, then such an arrangement could create barriers to competition in the market for the tied product. Jefferson Parish, 466 U.S. at 14. If a policy has no justification other than to maximize profits by chilling competition and removing choices from consumers then such a policy should be deemed anticompetitive.

In arguing that BellSouth's policy is anticompetitive as a general matter, MCI points out that BellSouth is willing to refuse an option to customers even at the risk of losing the customer. (MCI Brief, p. 12). MCI claims that BellSouth is using its dominant position in the DSL market to protect its monopoly voice profits. Id. at 14. BellSouth is technically capable of providing the DSL service to an MCI voice customer. At one point, voice customers of other CLECs received BellSouth's DSL service. (Tr. 499). During this time BellSouth did not experience any ordering and provisioning or maintenance and repair problems that it was unable to handle. (Tr. 501-502). The potential harm from BellSouth's policy is that as its DSL service grows, it will be able "to seal off more and more Georgia consumers from the benefits of local competition." (MCI Brief, p. 14).

The apparent motivation behind BellSouth's policy is to maintain its voice customers by denying them options in a separate market. The customers do not receive a benefit from being denied this option. In fact, they are harmed by being denied the option of receiving BellSouth's DSL service and another provider's voice service. While BellSouth will inevitably lose some DSL customers because of this policy, the only reasonable assumption is that BellSouth believes that it will keep enough voice customers that would have otherwise departed for a preferred CLEC that BellSouth will still come out ahead financially. This policy then insulates BellSouth's voice service from competition because customers that would like to switch to a preferred CLEC for voice service have a disincentive to do so.

BellSouth points to alternatives available to MCI, such as resale, cable modems, MCI's own DSL service and line splitting. As a preliminary observation, BellSouth's arguments do not ring true on this point. If BellSouth believed that customers would pursue these other options, then it could not afford to continue its policy. The whole premise has to be that customers are not likely to leave BellSouth's DSL service for these other options. The record reflects both the reasons why customers would want to avoid switching DSL providers and the limitations inherent in each of the options BellSouth raises. MCI witness, Ms. Lichtenberg, testified that switching out of BellSouth's DSL service to another mode of high speed internet access would require "disconnecting the FastAccess service, obtaining a different DSL modem, and possibly having to pay early termination fees." (Tr. 25). In addition, the customer would have to establish broadband service with a different provider, incur any connection fees, change his or her email address and notify his or her contacts of that change. (Tr. 25). Ms. Lichtenberg also testifies that the most obvious reason for a BellSouth DSL customer not wanting to switch to another high speed internet provider is because the customer wanted to receive voice and DSL service over the same line. (Tr. 25). CUC argues that customers who have grown accustomed to BellSouth's DSL service are not likely to forfeit these features in order to switch to a preferred voice provider. (CUC Brief, p. 6).

The limitations of the resale option were discussed in the tying analysis. Both of MCI's witnesses described the lack of success that has been achieved in resale. Ms. Lichtenberg observed the failure of the strategy for companies that have tried to mass market resale. (Tr. 120). Mr. Gillan testified that resale was fundamentally flawed. (Tr. 184). The Commission finds that the resale option is not a realistic alternative, and therefore, does not diminish the anticompetitive effects of BellSouth's policy.

The alternatives of cable modems, MCI's DSL service and line splitting raise the same basic question and thus can be analyzed together. The question is whether the ability to look elsewhere for DSL service, or other modes of high speed internet access, means that BellSouth's policy is not anticompetitive. MCI has argued that "given the current reality of the Georgia market," that other providers offer DSL service does not impact the anticompetitive effect of BellSouth's policy. (MCI Brief, p. 29). MCI again discusses the built-in advantage BellSouth has over other providers and the limitations in the size and scope of the offerings of other CLECs. Id. This argument is emphasized by the testimony of Mr. Gillan who argues, specifically in connection with the impracticality of MCI offering a competing package through line splitting, that "no carrier has been able to surmount the capital and operational barriers involved in providing DSL service to Georgia consumers on anything approaching the scale of BellSouth's FastAccess service." (Tr. 138). In addition, MCI asserts that the emergence of alternative DSL services will not affect those customers that have already locked into BellSouth's service and who will potentially incur expense and inconvenience in switching providers. (Tr. 41). CUC points out that since the FCC's Line Sharing Order was released on December 9, 1999, all three national DSL providers have filed for bankruptcy, and only Covad Communications Company has survived. (CUC Brief, p. 8, citing to MCI Complaint at 3, 5). CUC also draws attention to a subtlety in BellSouth's policy that is relevant to the issue of alternatives to BellSouth's FastAccess. An end-user cannot migrate to UNE-P service with a CLEC and maintain its DSL service with any DSL provider that buys DSL service wholesale from BellSouth. (CUC Brief, p. 11). Finally, CUC argues that regardless of any competitive broadband options, BellSouth is not relieved of its obligation under the law to not act in an anticompetitive manner. Id. at 14-16.

The Commission finds that the alternatives to BellSouth's DSL service do not substantially diminish the anticompetitive impact of BellSouth's policy on local voice competition, nor do they relieve BellSouth from its obligation to comply with the prohibition in O.C.G.A. § 46-5-169(4) against anticompetitive acts and practices.

While the Commission is not bound by decisions of other state commissions, it can be of assistance to review how this issue has been treated in other jurisdictions. The

Louisiana Public Service Commission ("LPSC") found that BellSouth's policy of requiring a customer to receive voice service from BellSouth in order to receive its DSL service was anticompetitive. *In Re: BellSouth's provision of ADSL Service to end-users over CLEC loops Pursuant to the Commission's directive in Order U-22252-E*, Order R-26173 (January 24, 2003). ("Louisiana Order"). The LPSC determined that the anticompetitive effects of BellSouth's policy were inconsistent with the LPSC's policy to promote competition. (Louisiana Order, p. 6). The full title of the State Act under which MCI has in part filed its complaint in this docket is "The Telecommunications and Competition Development Act of 1995." As indicated by this title, the framework of the State Act is structured to encourage competition in Georgia's local telecommunications market. The Commission administers the State Act. Similar to the LPSC, the Commission has an interest in striking down anticompetitive policies. The LPSC also emphasized that there were no technical reasons as to why BellSouth could not offer its DSL service to a CLEC voice customer. Id. at 8.

In an arbitration proceeding, the Florida Public Service Commission ("FPSC") ordered BellSouth to provide its FastAccess Internet Service to customers that receive voice service from Florida Digital Network. *In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Final Order on Arbitration, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP (Florida Public Service Commission, June 5, 2002) ("Florida Order"). The FPSC concluded that BellSouth's policy unreasonably penalized customers who wished to receive BellSouth's DSL service and voice service from the CLEC. (Florida Order, p. 11). The Commission agrees that BellSouth's policy is punitive for such customers because it denies them an option without there being any legitimate technical or policy reason. The FPSC also found BellSouth's policy to be inconsistent with the provision in Florida law that charges the FPSC with preventing any anticompetitive behavior. (Florida Order, p.11, citing FLA. STAT. ch. 364.01(g). MCI has brought this complaint under a Georgia statute that similarly prohibits anticompetitive acts or practices. O.C.G.A. § 46-5-169(4).

Whether BellSouth's policy is anticompetitive in violation of the State Act involves a policy as well as legal decision by the Commission based on the evidence that it has before it. For the reasons addressed in this portion of the order, the Commission finds that BellSouth's policy is anticompetitive in violation of O.C.G.A. § 46-5-169(4). In sum, BellSouth uses the tying arrangement to insulate its voice service from competition by impairing the customer's ability to choose its provider of local service. It would inhibit local voice competition for BellSouth to gain advantage over its current competitors in the local voice market because of the history of regulation in the industry. BellSouth's argument that it should be rewarded for its decision to lead the pack in investing in a DSL network is misguided for two reasons. First, as previously discussed, the argument ignores BellSouth's unique ability as a result of the industry's regulatory history to invest in a Georgia DSL network of that scope and scale. Second, the argument is misguided because BellSouth is reaping the rewards of its decision to invest in a DSL network of broad scope and scale. This Commission's decision is not telling

BellSouth that it cannot sell its DSL service. Nor is this Commission telling BellSouth that it cannot be compensated for selling its DSL service. It is not even telling BellSouth what price to offer for its DSL service. All the Commission is telling BellSouth is not to refuse customers an option separate from voice service in an effort to preserve its monopoly share of the voice market and insulate its voice service from the effects of competition. Any implication that as a result of this order BellSouth would be discouraged from investing in innovative technology in the future appears wholly inconsistent with the record in this docket. The record reflects that BellSouth has an overwhelming majority of the DSL lines in Georgia and that DSL, despite a relatively late start, has overtaken cable modems in Georgia.

While BellSouth's policy has the same anticompetitive effect as courts have warned against in the context of tying arrangements, namely insulating a product or service from competition, O.C.G.A. § 46-5-169(4) does not limit the prohibition on anticompetitive acts or practices to the confines of antitrust law. The phrase "as such terms are commonly applied in antitrust law" modifies the examples of anticompetitive acts or practices set forth in the statute. It does not limit the type of anticompetitive acts or practices that are prohibited. The Commission finds that BellSouth's practice violates the prohibition set forth in O.C.G.A. § 46-5-169(4) against anticompetitive acts or practices because it denies customers an option in a separate market for the purpose of preventing customers from exercising unfettered choice for local telecommunications service.

C. GENERAL FINDINGS AND CONCLUSIONS

The Commission notes that either Count 1, related to the interconnection agreement, or Count 2, related to state law, independent of the other count, would suffice to compel this Commission to order BellSouth to discontinue its policy. Moreover, either part of the count related to state law, illegal tying or generally anticompetitive act or practice, independent of the other violation, would suffice to compel this Commission to order BellSouth to discontinue its policy.

The Commission also notes that MCI testified that it would provide BellSouth access to the high frequency portion of its line without charging BellSouth for this access. (Tr. 170-171). The ordering of BellSouth to discontinue its policy is contingent upon MCI not imposing a charge on BellSouth for accessing the high frequency portion of the line that it leases from BellSouth.

Finally, the Commission's conclusions were based on the record before it. The Commission recognizes that the realities of the marketplace change. With that in mind, the Commission finds that it is prudent to conduct a review of the CLECs' efforts to build out their own network with DSL capability and the impact on the marketplace. The Commission shall issue an order on the results of that review thirty months from the date of this order.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues presented to the Commission for decision should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to the terms of the parties' interconnection agreements and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, that BellSouth shall discontinue its policy of requiring that customers receive voice service from BellSouth in order to receive BellSouth's DSL service. For the reasons stated herein, this policy is in violation of the parties' interconnection agreements and in violation of O.C.G.A. § 46-5-169(4).

ORDERED FURTHER, that the Commission's direction to BellSouth to discontinue its policy of requiring that customer receive voice service from BellSouth in order to receive BellSouth's DSL service is contingent upon MCI allowing BellSouth access free from any charge to the high frequency portion of the line leased from BellSouth.

ORDERED FURTHER, that the Commission conduct a review of the CLECs' efforts to build out their own network with DSL capability and the impact on the marketplace. The Commission shall issue an order on the results of that review thirty months from the date of this order

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 21st day of October, 2003.

____________________	____________________
Reece McAlister Executive Secretary	Robert B. Baker, Jr. Chairman
Date: ________________	Date: ________________

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
	)	
Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers	)	**WC Docket No. 03-251**

COMMENTS OF MCI

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January 30, 2004

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
	)	
Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers	)	**WC Docket No. 03-251**

COMMENTS OF MCI

Pursuant to the Commission's *Public Notice* and extension of time for filing comments,[1] MCI respectfully submits these comments on BellSouth's "Emergency Request for a Declaratory Ruling."

INTRODUCTION AND SUMMARY

BellSouth's petition promotes an anticompetitive practice that it does not even attempt to defend, and it mischaracterizes the preemption law which it seeks to use to shield this conduct from scrutiny. The petition should be denied.

The practice BellSouth asks the FCC to bless is this: It disconnects the service of its DSL customers who choose a competitor's local voice service. Many of these customers have no alternative broadband Internet access service and therefore must remain with BellSouth's narrowband voice offering if they wish to retain a broadband connection. Even when alternatives

[1] *See* Public Notice, *Pleading Cycle Established for Comments on BellSouth's Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Such Services to CLEC Voice Customers*, WC Docket No. 03-251 (Dec. 16, 2003); *Order*, WC Docket No. 03-251 (Dec. 30, 2003).

exist, BellSouth here exploits a tie-in between its DSL services and its ISP services, and the absence of any portability among ISP services. As a result, a change in broadband provider invariably means new equipment, new e-mail addresses, new web-pages, and disconnect and reconnect fees. Only consumers deeply dissatisfied with their broadband service are willing even to contemplate such a change, making BellSouth's tying especially effective.

BellSouth's practice is anticompetitive – it directly targets competitive narrowband voice services, and so it is conduct that could not be more at odds with the terms and purposes of the federal 1996 Act. The longer-term implications of BellSouth's practice are more ominous still. By tying broadband services to its narrowband voice services, BellSouth's practice is a crude effort to preserve its narrowband voice monopoly by requiring broadband consumers that might one day otherwise choose broadband Voice over Internet Telephony ("VoIP") voice service to pay for a narrowband voice service they will no longer want or need. In this way BellSouth's practice is directly in the teeth of this Commission's principal policy initiative – the promotion of broadband. Well aware that VoIP may be the "killer app" that spurs the broadband deployment that this Commission is promoting, BellSouth is using illegal tying to preserve its narrowband voice network and kill that "killer app." It won't work, but the idea that the Commission should step in and assist BellSouth in its attempt to preserve the value of its narrowband voice network in this way is difficult to countenance.

The claim that this Commission *should* promote this tying practice as part of national telecommunications policy is so ridiculous that BellSouth doesn't even make it. The claim that the Commission has done so inadvertently or otherwise in the *Triennial Review Order* ("*TRO*") or anywhere else is equally ridiculous. States that stop this practice violate no federal policy. In particular, nothing in the *Triennial Review Order* sanctions this anticompetitive practice or indicates that it is exclusively subject to federal oversight. The claim that states in any event have no power to act to stop such anticompetitive conduct in their state's local telephone market -- over which they have had regulatory responsibility for over a century -- is equally absurd. It is hard to imagine a less defensible practice, or a less meritorious petition.

ARGUMENT

I. BELLSOUTH'S PRACTICE IS ANTICOMPETITIVE

The state orders under review restrict BellSouth's "practice to discontinue FastAccess [Internet] service to those customers who migrate their local voice service from BellSouth to a CLEC where the CLEC provides local voice service using UNE-P or UNE-L."[2] The state orders also proscribe BellSouth's refusal to provide its DSL service to customers of competing voice service providers. After extensive evidentiary proceedings, each state PSC found that BellSouth's practice was without commercial justification, was not required by any technical characteristic of its network, and impeded competition in local telephone markets.[3] Here BellSouth disputes none of these conclusions.

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[2] *Complaint of Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. Regarding BellSouth's Practice of Refusing to Provide FastAccess Internet Service To Customers Who Receive Voice Service From A Competitive Voice Providers, And Request For Expedited Relief*, Docket No. 020507-TL, at 18 (Fla. PSC Nov. 20, 2003) ("*Florida PSC Staff Recommendation*"); *see also, e.g., Petition of Cinergy Communications Co. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Case No. 2001-00432, at 8 (Ky. PSC July 12, 2002).

[3] *See, e.g., BellSouth Telecomms. Inc. v. Cinergy*, No. Civ. A. 03-23-JMH, __F. Supp. 2d __, 2003 WL 23139419, at *7 (E.D. Ky. Dec. 29, 2003) ("Cinergy offered voluminous testimony describing BellSouth's anticompetitive practices and explaining how they would cripple Cinergy's ability to compete in the local voice market."); *Georgia PSC Order*, No. 11901-U, at 16-17 (summarizing evidence of anticompetitive effect by MCI and CUC); *Florida PSC Staff Recommendation*, No. 020507-TL, at 21-27, 42-47, 56-61 (summarizing evidence of anticompetitive effect).

BellSouth's practice locks in narrowband voice customers so effectively that "it is difficult for a CLEC to entice a customer away from BellSouth once that customer has FastAccess." *Florida PSC Staff Recommendation*, No. 020507-TL, at 46. The Florida PSC Staff concluded from the witness testimony "that [BellSouth's] practice effectively keeps customers from switching" and that "BellSouth adopt[ed] its practice to keep customers from switching voice service." *Florida PSC Staff Recommendation*, No. 020507-TL, at 45. The Georgia PSC similarly concluded that BellSouth uses the tying arrangement to "insulate [its] voice service from competition because customers that would like to switch to a preferred CLEC for voice service have a disincentive to do so." *Georgia PSC Order*, No. 11901-U, at 16. Testimony from carrier after carrier supported these conclusions. Small business customers, in particular, were unwilling to consider another voice provider when they believed that switching from BellSouth's service might lead to a disruption in their email communications and Internet access.[4]

Some customers are locked in because they have no alternative: BellSouth is the only available broadband provider. Particularly, for many small and medium sized businesses who are not served by cable modem service, BellSouth is the only broadband choice. Thus, if they use a competitive local voice provider, they are unable to obtain broadband services.

The lock-out is almost as effective even when there is another broadband provider. The state commissions found that even when these options exist, the many impediments to switching

[4] *See, e.g.*, FDN Answer Br., *BellSouth Telecomms., Inc. v. FDN, Inc.*, No. 4:03 CV 212-RH/WCS, at 32-36 (filed Nov. 7, 2003) (summarizing record evidence); Florida PSC Answer Br., *BellSouth Telecomms., Inc v. FDN, Inc.*, No. 4:03 CV 212-RH/WCS, at 31-34 (filed Nov. 7, 2003); MCI's Post-Hearing Br., *Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 11901-U, at 8-10, 12-16 (filed Apr. 29, 2002); Cinergy Br., *BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, No. 02-23-JMH, at 36-38 (filed Aug. 15, 2003); *Amici* Br. of AT&T Corp. and MCImetro Access Transmission Services, *BellSouth v. Cinergy*, 2003 WL 23139419, at 23-25 (filed Aug. 15, 2003).

broadband providers made these options impractical. "Although BellSouth claims that the CLECs have options for providing their own DSL service, it is clear from the record, that as a practical matter, these are not reasonable, viable options." *Florida Staff Recommendation*, No. 020507-TL, at 44.[5] "[S]witching out of BellSouth's DSL service to another mode of high speed Internet service would require 'disconnecting FastAccess service, obtaining a different DSL modem, and probably having to pay early termination fees.'" *Georgia PSC Order*, No. 11901-U, at 16 (quoting MCI witness Sherry Lichtenberg); *see also Florida Staff Recommendation*, No. 020507-TL, at 55 ("the customer must disconnect his FastAccess, obtain a different DSL modem, and likely change his e-mail address") (citing Tr. at 167). "[T]he customer would have to establish broadband service with a different provider, incur any connection fees, change his or her email address, and notify his or her contacts of that change." *Georgia PSC Order*, No. 11901-U, at 16 (citing Tr. at 25); *see also Florida PSC Staff Recommendation*, No. 020507-TL, at 23 (citing Tr. at 55). As was noted in the Georgia proceeding, customers "who have grown accustomed to BellSouth's DSL service are not likely to forfeit these features in order to switch to a preferred voice provider." *Georgia PSC Order*, No. 11901-U, at 17.

Assessing these facts, each of these PSCs determined that BellSouth violated state communications law because its "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of . . . customers to choose their own telecommunications carriers." *Kentucky PSC July 12, 2002 Order* at 7.

[5] *See also Georgia PSC Order*, No. 11901-U, at 7-8, 17 (finding alternatives such as resale, cable modems, CLEC DSL service and line splitting effectively unavailable, and that "the alternatives to BellSouth's DSL service do not substantially diminish the anticompetitive impact of BellSouth's policy on local voice competition").

The evidence on this point was overwhelming. In Georgia, the evidence showed that more than 4,900 Georgia customers had declined MCI's service only because they did not wish to have their BellSouth DSL service disconnected. *See* MCI's Post-Hearing Br., *Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 11901-U, at 9 (filed Apr. 29, 2002) (citing Tr. at 38-39, 75).

In Kentucky, Cinergy offered voluminous testimony describing BellSouth's anticompetitive practices and explaining how they would cripple Cinergy's ability to compete in the local voice market. Cinergy showed that, when its customers call BellSouth to ask about DSL service, BellSouth tells the customer it must return local phone service to BellSouth to get BellSouth's DSL service. (Heck Direct at 12; *accord* Heck Dep. at 33-35.) The unrebutted testimony also proved that BellSouth cancels its customer's DSL Internet service when that customer attempts to move voice service to Cinergy. (Heck Direct at 14.) And Cinergy has failed to secure numerous voice customers to BellSouth as a result of these practices because "[o]nce a customer learns that they will lose their ADSL Internet service by moving to [Cinergy's] local voice service[,] they are no longer willing" to become a Cinergy voice customer. (*Id.*; Heck Dep. at 31-33, 35-36.) As Cinergy explained, the ultimate effect of BellSouth's conduct will be to "remonopolize" the local voice market. (*See* Heck Direct at 5, 9, 36; Heck Revised Rebuttal at 25-26.)

In Louisiana, the record similarly demonstrated that BellSouth had successfully blocked competitors' access to customers by assigning DSL service to a customer's primary line. (*E.g.*, Jan. 18, 2002 KMC Initial Comments at 3, R. 1211; Jan. 18, 2002 Xspedius Comments at 1, R. 1247.) As the CLECs explained, BellSouth's control of the primary line prevents competitors from serving any secondary lines as all incoming calls are directed initially to the primary line. (Jan. 18, 2002 KMC Initial Comments at 3, R. 1211; Jan. 18, 2002 Xspedius Comments at 1, R. 1247.) Other comments described how BellSouth's billing practices erected barriers to competition by requiring customers either to pay for their DSL service using a credit card or to switch their voice service back to BellSouth. (Jan. 18, 2002 ACCESS Initial Comments at 2, R. 1235.) When faced with this option, customers "typically switch back to BellSouth because their billing systems require invoices and lack procedures to pay for service by credit card." (*Id.*) In addition, the record established that BellSouth engaged in the practice of placing certain service codes on customer accounts (regardless whether that customer actually receives DSL service from BellSouth or is simply "eligible" to receive such service) to prevent the transfer of that customer's voice service to a competing carrier. (Dec. 21, 2001 Letter from Network Telephone, R. 1286-87.) As this evidence demonstrated, BellSouth deliberately configures its wholesale ordering system so that it rejects otherwise valid orders to switch a customer's voice service to a competitive carrier. (Aug. 23, 2002 KMC Telecom Reply Comments at 2.)

In Louisiana, BellSouth rejects CLEC orders to provide voice service if the customer's record contains the BellSouth DSL service code. (May 24, 2002 KMC Telecom Reply Comments at 2-3, R. 1152-53.) The CLEC must thereafter inform its prospective voice customer that he or she must contact BellSouth to remove the code before the CLEC can even submit the order for voice service. (*Id.*) If the customer has DSL service, the CLEC must inform the customer that he or she must disconnect BellSouth's DSL service before the CLEC can submit the service order. (*Id.*) By requiring customers to become entangled in the process of removing these service order codes from their accounts, BellSouth creates a "significant disincentive" for the customer to migrate to a CLEC's service. (*Id.*) As the CLEC commenters showed, customers have decided against migrating to a CLEC's service because "BellSouth delayed too long and made it too difficult to switch carriers." (*Id.*) BellSouth's own witness in the Louisiana action conceded that in May 2002, BellSouth rejected 204 orders because these DSL ordering codes were placed on customers' accounts. (Aug. 23, 2002 KMC Telecom Reply Comments at 4.)

The Louisiana record further established that such a policy is particularly damaging to competition for business customers, as many small business cannot afford to be without DSL service for the period of time it takes BellSouth to process a CLECs' voice order. (May 24, 2002 KMC Reply Comments at 5, R. 1155.) CLEC commenters submitted testimony showing that BellSouth's policy "prevents businesses from switching to [a CLEC's service] because the business cannot afford to be without its data services for the month or more it takes BellSouth to process [a CLEC] UNE order." (*Id.* at 5-6, R. 1155-56.)

Also in Louisiana, MCI established that BellSouth's policies "lock-in" customers. Specifically, MCI showed that, in July 2002, at least 103 residential customers subscribing to BellSouth's DSL service in Louisiana attempted to sign up for MCI's "the Neighborhood." (Aug. 23, 2002 WorldCom Reply Comments at 2-3.) Due to BellSouth's DSL policy, however, BellSouth rejected all of these customers' orders. (August 23, 2002 WorldCom Reply Comments at 2.) MCI also described BellSouth's practice of encouraging customers to enter into long-term arrangements under which customers must pay penalty fees if they attempt to terminate service before the end of the contract term. (Aug. 23, 2002 WorldCom Reply Comments at 2; May 24, 2002 WorldCom Reply Comments at 1, R. 1162.)

This is classically unlawful conduct. When "a monopolist refuses to deal with customers who deal with its rivals," such behavior is "inherently anticompetitive [and] . . . is illegal." *Byars* *v. Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir. 1979); *accord Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53 (1951); *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 374-76 (9th Cir. 1966). Because BellSouth is "willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival," *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985), it is presumptively engaged in classic anticompetitive behavior. This is also the view of the leading antitrust commentators:

> Extraction of an agreement not to deal with any competitor – or the equivalent, refusing to deal with buyers who do – can be exclusionary and particularly damaging where the buyers cannot do without the seller's product or service. We see no convincing justification for a requirement that a customer not deal with a particular rival.

IIIA Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 768e6 (1996).

Indeed, the state commissions received ample evidence vividly documenting BellSouth's refusal to deal with customers who deal with its rivals. *Byars*, 609 F.2d at 858. As the Georgia Public Service Commission recognized, "BellSouth is willing to refuse an option to customers even at the risk of losing the customer" ostensibly because it "believes that it will keep enough voice customers that would have otherwise departed for a preferred [competitive carriers] that BellSouth will still come out ahead financially." *Georgia PSC Order*, No. 11901-U, at 16.

BellSouth's objections to the State's orders based on claims about broadband market power are wholly beside the point, for two reasons. First, the states correctly focused on the imminent harm BellSouth's conduct will inflict upon competition in *local voice services* where BellSouth undoubtedly has market power. *See Kentucky PSC July 12, 2002 Order* at 7-8; *Kentucky PSC Oct. 15, 2002 Order* at 4. The PSCs could not have been clearer regarding that harm. For example, the Kentucky Commission found that BellSouth's practices would enable it "to increase its already considerable market power in the voice market." *Kentucky PSC July 12, 2002 Order* at 7. As the PSC stated, "[o]ur decision reflects *our concern for voice customers in Kentucky* as well as for the preservation of telecommunications competition and the availability of DSL to Kentucky's citizens." *Kentucky PSC Oct. 15, 2002 Order* at 4 (emphasis added); *see also Iglou Internet Servs., Inc v. BellSouth Telecomm., Inc.*, Case No. 99-484, slip op. at 9 (Ky. PSC Nov. 30, 2000) (citing "[the PSC's] *frequently reiterated* position in favor of telecommunications competition" and finding BellSouth's DSL tariff practices "unacceptable"); *Provision of InterLATA Services by BellSouth Telecomms., Inc.*, Case No. 2001-00105, slip op. at 13-14 (Ky. PSC Apr. 26, 2002) (predicting adverse impact on advanced services market of BellSouth's DSL practices).

Additionally, BellSouth's focus on broadband market power is also mistaken because broadband market power is not a predicate to the competitive harm that "lock in" causes and that the PSCs addressed. Even if there were significant competing suppliers of wholesale broadband services (which there are not), and even if BellSouth were not a principal supplier of broadband services (which it is), BellSouth's telephone customers are nonetheless "locked in" where they also rely upon the BellSouth DSL service. In such cases, the PSC correctly found that telephone competition would be impaired unless BellSouth's DSL practices were restrained.

The D.C. Circuit recently addressed an analogous "lock in" effect, where it upheld the FCC's determination that wireless carriers (which do not have market power) must allow their customers to retain their telephone numbers when they switch carriers. *See Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 510-11 (D.C. Cir. 2003). The court rejected the carriers' argument that the FCC's order was arbitrary and capricious, reasoning that "having to switch phone numbers presents a barrier to switching carriers," and "consumers 'will find themselves forced to stay with carriers with whom they may be dissatisfied because the cost of giving up their wireless phone number in order to move to another carrier is too high.'" *Id.* at 513 (quotation omitted). Exactly the same problem is presented here: BellSouth's telephone customers will not switch telephone service providers because BellSouth's DSL practices impose high switching costs.

In any event, it is clear that BellSouth has market power in broadband access services. The market for these purposes is local, "the []area in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (emphasis omitted). While cable television systems provide the only material source of competition with DSL services, cable services generally do not serve business customers. *See* Paul J. Roche, *DSL Will Win Where It Matters*, 2001 The McKinsey Quarterly 180, 183 ("More than 80 percent of midsize and small businesses are sufficiently close to a telephone-switching office to subscribe to DSL, whereas cable . . . reaches fewer than 20 percent."). And where cable competition exists, the result is a duopoly in which BellSouth still retains significant market power in the broadband market.

Both before the state commissions and here, BellSouth has been unable to suggest any legitimate basis for its practice. All the state PSCs rejected as unsupported BellSouth's claims that technological limitations justified its restrictive policies, a point BellSouth does not even press here, and one that is unsustainable in light of the fact that Qwest, for example, is willing and able to provide CLEC voice customers its DSL-based services.[6] BellSouth's sole defense is that this exclusionary practice would benefit its bottom line, *see, e.g.*, *Louisiana PSC Order*, No.

[6] *See, e.g.*, *Florida PSC Staff Recommendation*, No. 020507-TL, at 56-61; Rebuttal Test. of Sherry Lichtenberg, *Florida PSC Staff Recommendation*, No. 010507-TL, at 5-9 (filed Dec. 23,

R-26173, at 6. But a tying practice used to preserve monopoly revenue is unlawful when the monopolist simply declines to provide the tied service even though it would be profitable for it to do so. As the Florida PSC found, BellSouth "states that there is *no* profit margin at which it would offer FastAccess service [to CLEC voice customers] and that it would rather lose the customer than provide FastAccess." *Florida Staff Recommendation*, No. 020507-TL, at 24 (citing Florida Competitive Carrier's Association Br. at Ex. 7; BellSouth Response to Staff's Interrogatory No. 28) (emphasis added). ILEC officers have been unusually candid about using bundled offerings to lock in customers and to preserve their market share in local telephone services.[7] It is hard to imagine a less defensible practice.

II. THE STATES HAVE AMPLE AUTHORITY TO RESPOND TO BELLSOUTH'S ANTICOMPETITIVE PRACTICES.

BellSouth argues broadly that under the scheme of "cooperative federalism" set out in the 1996 Act, and the surviving preexisting law concerning federal-state jurisdiction over communications services, the FCC has occupied the field and so the states have no authority to regulate the services at issue here. That is plainly wrong.

A. The States Have Jurisdiction Over Local Telecommunications Services.

To begin, this is foremost a regulation of local voice telephony services. The competitor's local voice services the states here attempt to protect against BellSouth's tying are just that – local voice services. The PSCs have clear and exclusive authority over local telephony and the conditions limiting competition in the service. *See* 47 U.S.C. § 152(b). Sections 251-

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2002); *Georgia PSC Order*, No. 11901-U, at 8-9; MCI's Post-Hearing Br., *Georgia PSC Order*, No. 11901-U, at 27-31; *Florida PSC FDN Order*, No. PSC-02-0765-FOF-TP, at 5-8.

[7] *See, e.g.*, *Investor Briefing for Second Quarter 2003* (SBC Communications Inc., San Antonio, Tex.), July 24, 2003, at 1, 2, 5-6; Statement of Edward Whitacre, CEO, SBC Communications,

252, and the 1996 Act more generally, clearly preserve the PSC's authority to foster local competition in this fashion. *See* 47 U.S.C. § 251(d)(3) ("Preservation of State access regulations"); *id.* § 252(e)(3) ("Preservation of authority": "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement"); *id.* § 261(b) (preservation of state regulatory powers to fulfill requirements of local competition requirements); *id.* § 261(c) (no preclusion of state regulation "for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part"); 1996 Act, § 601(c), 110 Stat. at 14 (the 1996 Act "shall not be construed to modify, impair, or supersede Federal, *State*, or local law unless *expressly so provided* in such Act or amendments.") (uncodified note to 47 U.S.C. § 152) (emphasis added); *see also Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428 (6th Cir. 2003); *AT&T Communications v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 642 (5th Cir. 2001); *MCI Telecomms. Corp. v. US West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent"). Even BellSouth does not argue that the Act expressly limits state actions such as the PSC's, and, as discussed below, no inconsistency between federal and state requirements exists that would support a finding of preemption.

B. States Have Jurisdiction Over Local and Jurisdictionally Mixed Services.

Additionally, the DSL telecommunications services and ISP information services at issue here are both jurisdictionally mixed: When an ISP uses the services, it delivers information to its

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Q1 2003 SBC Communications Earnings Conference Call (Apr. 24, 2003), *available at* 2003 WL 18979281.

customers that originates on servers within the state as well as information that originates beyond the state's boundaries. Much if not most of DSL service consists of local communications: Web browsing often involves a communication between an end user and a local server that stores downloaded (or "cached") website information; many websites accessed directly by customers are located within the consumer's state; and virtually all DSL calls are initiated by a communication to a local server. Since DSL service also consists of communications directly to out-of-state websites, and for this reason it is "jurisdictionally mixed"—that is, it combines intrastate and interstate communications—as the FCC itself has concluded. *See ISP Remand Order* ¶¶ 14, 52 & nn.97-98 ("the interstate and intrastate components [of ISP] cannot be reliably separated"); *see also Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (affirming FCC's determination that ISP-bound traffic is jurisdictionally mixed); *GTE Order* ¶¶ 22-29. The ILECs themselves have acknowledged in proceedings concerning the BellSouth ADSL service at issue here that "communications through the Internet using ADSL service may be intrastate, interstate, or international." *Bell Atl. Tel. Cos. Order* ¶ 11.

BellSouth is wrong when it claims that the FCC has exclusive jurisdiction because these jurisdictionally mixed services involve in part interstate communications. Even before the 1996 Act, that statement was true only for facilities and services used *exclusively* for interstate communications. But the FCC has never had exclusive authority when, as here, services and facilities carry *both* interstate and intrastate communications. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373-76 (1986); 47 U.S.C. § 152(b).

Sections 1 and 2(b) of the Communications Act empower the FCC to regulate interstate communications and preserve state authority to regulate intrastate communications. 47 U.S.C. §§ 151, 152(b). In rejecting the same argument BellSouth makes here, the Supreme Court explained that the FCC does not have "plenary" authority just because it is regulating interstate communications, because "virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities." *Louisiana PSC*, 476 U.S. at 360; *see also, e.g.*, *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) ("*California II*"); *California v. FCC*, 905 F.2d 1217, 1241-43 (9th Cir. 1990) ("*California I*"); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 428-29 (D.C. Cir. 1989) ("*NARUC*"); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977). "In reality, since most aspects of the communications field have overlapping interstate and intrastate components, these two sections do not create a simple division [of authority]; rather they create persistent jurisdictional tension." *Public Util. Comm'n of Tex. v. FCC*, 886 F.2d 1325, 1329 (D.C. Cir. 1989).

In resolving this jurisdictional tension, "the *only* limit that the Supreme Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." *NARUC*, 880 F.2d at 429; *see* 47 U.S.C. § 261(c) (preserving state regulation of intrastate services if not "inconsistent" with federal statute or implementing regulations); *id.* § 251(d)(3). Preemption exists only when the FCC affirmatively asserts preemption, and it can do so only when "it can show that the state regulation negates a valid federal policy" and "only to the degree necessary to achieve it." 880 F.2d at 430-31 (emphasis omitted); *see California II*, 39 F.3d at 931-32. The FCC bears the burden of meeting this showing. 880 F.2d at 431; *GTE Order* ¶ 28. And even the FCC's exercise of its express preemption power in such circumstances does not preclude all state regulation, but only that "inconsistent" or "conflict[ing]" with the "valid federal regulatory objective." *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989); *Michigan Bell Tel. Co.*, 339 F.3d at 434-35.

Neither does Commission silence about "jurisdictionally mixed" traffic imply preemption. To the contrary, in the absence of FCC preemption, states are free to regulate jurisdictionally mixed telecommunications traffic. *See Southwestern Bell*, 153 F.3d at 542 (rejecting argument that FCC's decision not to preempt state regulation of jurisdictionally mixed service "amounts to a dereliction of the [FCC's] obligation to retain exclusive jurisdiction over interstate communications and forces state regulatory commissions to overstep their authority"); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 480 (5th Cir. 2000) (rejecting argument that FCC preempted all regulation of Internet traffic based on its interstate component); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1122-23 (9th Cir. 1999).[8]

Finally, the 1996 Act did not change the law in this area, as the citation to many post-1996 Act cases above makes clear. Rather, as we indicated in the previous section, *supra* p. 13, the 1996 Act expressly preserved the states' authority except to the extent expressly altered by the substantive provisions of the 1996 Act. And none of those provisions addressed in relevant respects the treatment of jurisdictionally mixed services.

[8] The Commission has declined to preempt state regulation of jurisdictionally mixed services when it has not found a pressing policy need supporting uniform federal regulation over those services. *See, e.g.*, *In re Furnishing of Customer Premises Equip. by the Bell Operating Tel. Cos. & the Independent Tel. Cos.*, 2 F.C.C.R. 143, ¶¶ 121-129 (1987), *pet. for review denied, Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *In re Filing & Review of Open Network Architecture Plans*, 4 F.C.C.R. 1, ¶¶ 276-180 (1988), *pet. for review denied, State of California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689 (1999).

In sum, these orders are commonplace exercises of state authority over local and jurisdictionally mixed communications services, and BellSouth's claim that the FCC has occupied the field in this area is frivolous.

III. THE STATES' ORDERS ARE NOT OTHERWISE PREEMPTED BY FEDERAL LAW.

As we have shown, because the FCC has not occupied the field in this area there can be preemption only if the state rule "negates a valid federal policy," and "only to the degree necessary to achieve it." *NARUC*, 880 F.2d at 430-31; 47 U.S.C. § 152(b); *id.* § 261(c). But BellSouth's attempts to manufacture an inconsistency between FCC policy and the states' orders are here frivolous. The state rulings conflict with neither the *Triennial Review Order*, the FCC's regulatory treatment of "information services," the FCC's treatment of federally tariffed services, nor any other federal rule. To the contrary, the state regulation *advances* federal policies promoting local competition and promoting deployment of broadband facilities. The fact that the FCC has not yet determined that BellSouth's conduct is unlawful under federal rules of course does not establish that the conduct is federally protected.

A. The States Orders Do Not Violate the *Triennial Review Order*.

BellSouth wrongly claims that in *Triennial Review Order* the FCC preempted the states from issuing any regulation in this area. Specifically, BellSouth claims that the state orders should be preempted because, under the *TRO*, "states may not impose unbundling obligations that this Commission has considered and rejected" and because the state orders impair the Commission's policy regarding "the need to preserve incentives to engage in facilities-based competition." Petition at 10, 15. This argument is wrong on two grounds: the state rules at issue here are not unbundling rules; and in any event the FCC did not purport to preempt all state unbundling rules in the *TRO*.

First, none of the state orders at issue require any unbundling. The states merely required BellSouth not to restrict its DSL offering. BellSouth says this is tantamount to requiring the unbundling of the low-frequency portion of the loop. But that is plainly not the case. The orders presumed that the CLECs would have to secure and pay for the *entire* loop. Indeed, as the Florida PSC made clear, BellSouth remains free to offer its DSL services over one loop and give CLECs an entirely different loop. BellSouth in fact acknowledges that the CLEC must lease the entire loop and that the state requirements apply to the "unbundled loop," not to any new UNE related to the low-frequency portion of the loop. Petition at 29-30. Nor is this a case in which CLECs who lease loops subsequently deny access to BellSouth to provide broadband functionality to the customer. The sum of the matter is that the *Triennial Review Order* said nothing about ILECs' ability to restrict DSL service to its own telephony customers.

In any event, even if the state commissions had ordered BellSouth to unbundle the low frequency portion of loops as separate UNEs – which they did not – that still would not be a ground for preemption. BellSouth refers to the Commission's statement that it "believe[s] it is unlikely that [a decision to provide unbundling beyond that provided by federal law] would fail to conflict with . . . the federal regime." *TRO* ¶ 195. But as the Commission has made clear in defending the *TRO* in the appellate court, no appeal of that prediction is ripe, because the Commission did not in the *TRO* preempt any state law, and did not even state definitively that it would do so in the future. Instead, it left the question for another day, permitting the states to issue whatever rules they felt appropriate, with carriers free to bring those rules to the Commission if they felt they were preempted. That is a palpably inadequate ground to support

BellSouth's claim here that a particular state rule has already been preempted by the FCC. Indeed, for "*existing* state requirements" such as those in the orders at issue, the Commission noted that only "in some instances" would a conflict exist requiring preemption. *Id.*

Moreover, the indications the Commission gave in the *TRO* powerfully support the view that these state rules (even if viewed incorrectly as unbundling rules) would *not* be preempted. For the Commission held as mandated by the 1996 Act that preemption would exist arise only where state orders "'substantially prevent' the implementation of the federal regime," *TRO* ¶ 192 n.611 (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 806 (8th Cir. 1997), *rev'd in part*, 525 U.S. 366 (1999)), and only if a federal policy were "negated" through a clear inconsistency with federal law. *See NARUC*, 880 F.2d at 428-29; *cf.* 47 U.S.C. § 252(d)(3). And, to repeat, nothing in these state orders remotely impedes or negates any federal policy. To the contrary, the state rules *support* federal policy both by removing impediments to voice competition, and by striking at BellSouth's efforts to preserve its narrowband voice offering by impeding the development of VoIP services.

BellSouth also points to an alleged conflict between the state orders and one of the Commission's "core policies" of "the need to preserve incentives to engage in facilities-based competition." Petition at 15-16. This is a frivolous claim. By tying broadband offerings to BellSouth's narrowband voice service, BellSouth's practice is designed to *impede* broadband deployment in an effort to prop up the value of BellSouth's narrowband network. As such, the state rules here strongly enforce federal policy of promoting deployment, and in particular promoting broadband deployment. Additionally, the claim that they are targeted only at UNE-P is false. The proscribed tying arrangements apply equally to would-be UNE-L providers as to UNE-P providers. In any event, and apart from all of that, it obviously does not advance FCC policy to make UNE-P unattractive through this anticompetitive practice in situations in which the FCC (and the states) have concluded that competitors will be unable economically to serve the market unless they have access to UNE-P.[9]

B. The States Have Ample Power To Prohibit Anticompetitive Practices Even if They Involve An Information Service.

BellSouth also claims that "[t]he Commission has precluded state regulation of interstate information services" and thus has preempted any state regulations affecting retail DSL services. Petition at 19. This is doubly wrong. The conduct at issue here does not concern exclusively interstate information services, and, even if it did, states are not automatically preempted from regulating such services.

1. <u>The State Rules Do Not Principally Address Interstate Information Services.</u>

To begin, for three reasons the state rules are not principally regulations of interstate information services.

First, they are instead principally regulations designed to prevent an anticompetitive practice designed to deter competition in the narrowband voice market, and the voice services affected by this conduct are indisputably telecommunications services.

Second, as indicated above, some of the information services involved are intrastate, not interstate.

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[9] BellSouth also refers to the Commission's conclusion in the *TRO* that the existence of line-sharing might impede "innovative line-splitting arrangements." Petition at 16. But this is a reference to the Commission's view that the relevant incentive depends upon whether the CLEC must pay for the entire loop, and then try to secure revenues to justify the expenditure, or is entitled through line-sharing to secure and pay for less than the entire loop. *See TRO* ¶¶ 260, 263. But under the state orders here, the CLEC must pay for the entire loop, and so under that reasoning it has the maximum incentive to innovate, including through use of line-splitting arrangements. The state orders thus do not conflict with any policy that led to the elimination of line-sharing.

Third, just because BellSouth has chosen to bundle its DSL transmission telecommunications services[10] with its ISP information services does not mean that the resulting service offering is only or even primarily an information service. The Commission has long held to the contrary that carriers cannot shield their telecommunications services from telecommunications regulation in this manner. *E.g.*, *Frame Relay Order* ¶ 42. While the Commission has tentatively concluded that this policy should be reversed in the *Broadband Framework NPRM*, it has not acted on that controversial tentative conclusion. And in the parallel situation presented by cable modem services, the courts have found that the service is both a telecommunications service and an information service. *See Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (pet'n for review pending); *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

Here, of course, it is BellSouth's bottleneck control over local access telecommunications facilities used to provide broadband services that gives it the power to engage in the discriminatory practice at issue, and these are telecommunications services, not information services. If the only services at issue here were BellSouth's ISP information services, BellSouth would have no power to engage in this discriminatory conduct. The FCC should not countenance BellSouth's effort to bundle that local transmission service with an information service, then in turn tie *that* bundle to its local voice service and claim the whole bundled package is immune from state regulation (and, apparently, federal regulation as well) because it is an information service. It is not.

[10] There is no dispute that such services are telecommunications services. *See, e.g.*, *Broadband Framework NPRM*.

2. The States Are Not Preempted From Regulating Information Services.

In any event, even if this were simply regulation of an information service, BellSouth is wrong to claim that states are "automatically" preempted from regulating interstate information services. *California I* held precisely to the contrary. There, the Ninth Circuit set aside FCC orders that assertedly "preempted nearly all state regulation of the sale of enhanced services." 905 F.2d at 1235. The court rejected the same arguments that BellSouth has offered here, finding that section 2(b) preserved a state role with respect to information services. *Id.* at 1240. It also rejected the argument that because intrastate and interstate communications are affected by any state regulation, broad preemption was warranted. *Id.* It concluded instead that state regulation of information services affecting interstate communications is not preempted unless the FCC issues a rule that is "narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals." *Id.* at 1243.[11]

The FCC's own regulation of information services permit a state role inconsistent with BellSouth's broad preemption argument. In both the *Cable Modem Ruling* ¶ 33, , and the *Broadband Framework NPRM* ¶ 13, the FCC (wrongly, in our view) determined that the high-speed Internet access service over self-provided transmission facilities is exclusively an information service. In both orders, however, the FCC also recognized that the information service regulatory classification did not automatically mean that state regulation was preempted, and instead sought comment on "whether we should use our preemption authority to preempt specific state laws or local regulations." *Cable Modem Ruling* ¶ 99; *see also Broadband Framework NPRM* ¶ 62 (same).

[11] *See also Southwestern Bell*, 208 F.3d 475 (states may regulate interstate ISP traffic); *Michigan Bell Tel. Co.*, 339 F.3d at 434.

In fact, the Commission has preempted state regulation of interstate information services only when states have attempted to "impose common carrier tariff regulation on a carrier's provision of enhanced services." *Computer II* ¶ 83 n.34. Here the state commission orders have not engaged in common carrier tariff regulation of BellSouth's DSL service. They simply prevent BellSouth from tying its DSL services to its voice services. As the Louisiana PSC stated, it "does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service and does not establish any pricing for BellSouth's DSL." *Louisiana PSC Order*, No. R-26173, at 12, 15; *see also Florida PSC Staff Recommendation*, No. 020507-TL, at 15; *Florida PSC FDN Order*, No. PSC-02-0765-FOF-TP, at 11.

For that reason, there is a clear distinction between the kind of antidiscrimination regulation at issue here and, for example, the preempted common carrier regulation imposed by the Minnesota PUC directly on a VoIP information service. *See Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003). There the Minnesota PUC improperly attempted to subject Vonage to the traditional panoply of common carrier obligations that it applied to all telecommunications carriers. The state commissions here have attempted no such thing with respect to BellSouth's DSL service.

C. The States Order Is Consistent With BellSouth's Tariff.

BellSouth's argument that the states' orders conflict with or alter its tariffs is doomed by the tariffs' own language. Because the orders do not require action contrary to the tariff, claims based on the tariff must fail. *See Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 711 (5th Cir. 1999) (PUC action not preempted by federal tariff where "[i]t does not concern the provision of services which are covered by the filed tariff, but rather . . . actions outside the scope of the tariff").

The "conflict" to which BellSouth points does not exist. BellSouth's argument relies solely on the tariff language that BellSouth will provide service to an "end-user premises" that is serviced by an "existing, in-service, Telephone Company *provided* exchange line *facility*." *BellSouth Telecomms. Inc.*, Tariff F.C.C. No. 1, § 7.2.17(A) (May 31, 2002) ("BellSouth Tariff") (emphasis added). BellSouth claims that this tariff language is inconsistent with providing the tariffed service over BellSouth loops leased to a CLEC. BellSouth is plainly wrong about this.

The most natural reading of this language to the contrary is that BellSouth will offer DSL transport service only over its own existing, active facilities. That is, it will not offer the service over facilities built, owned, and maintained by other carriers (such as neighboring incumbent carriers) and will not offer the service over inactive facilities. This reading is reinforced by the definition of an "in-service exchange line facility," which is the Central Office line equipment and all plant facilities up to the network interface device (which are clearly owned and provided by BellSouth, not a competitive carrier). *Id.* at 20.

But when a CLEC offers service over UNE-P, BellSouth retains the ownership of the line, including obligations to maintain and repair it and the ability to account for it as an asset (and depreciate it in the income statement). That is, there remains a BellSouth-"provided exchange line facility." Indeed, BellSouth does not dispute that it provides UNE-P services to competitive carriers over its facilities, which necessarily requires that BellSouth is continuing to provide its facility no matter what services it supports.

BellSouth further contradicts its own argument when it acknowledges that it will provide DSL service when a competitive carrier "resells" BellSouth's retail service (rather than leasing UNEs). In both cases, BellSouth provides the exchange line facility, and the competitive carrier provides service to customers employing that BellSouth facility. Furthermore, the tariff specifically states that a CLEC can designate the end-user premises. BellSouth Tariff § 7.2.17(A) (Addendum 1). This language would make no sense if a CLEC could not make use of a line that is a BellSouth-"provided exchange line facility." BellSouth Tariff § 7.2.17(A) (Addendum 1).

Even if the tariff's terms were not perfectly clear and consistent with the PSC orders and with BellSouth's own understanding, any ambiguity in the tariff must be resolved against BellSouth. *See Norfolk & W. Ry. v. B. I. Holser & Co.*, 629 F.2d 486, 488 (7th Cir. 1980) ("'tariff[s] should be construed strictly against the carrier since the carrier drafted the tariff'"); *Bell Atl.-Del. Corp. v. Global Naps, Inc.* ¶ 22 ("ambiguous tariff provisions must be construed against the drafting carrier").

If BellSouth truly wants to write its tying practice into its tariff – and thus have facilities "provided" by BellSouth exclude BellSouth's facilities that serve CLECs' telephony customers – then BellSouth must rewrite its tariff to express clearly this counter-intuitive and anticompetitive outcome. A new tariff filing that expressly limited the DSL service then would be subject to review by the FCC and challenge by users of the service, *see* 47 U.S.C. §§ 204-205, which would prompt a broad investigation of the anticompetitive effect of BellSouth's practice, whether it is "reasonable" under federal law, and whether it met the federal requirement that BellSouth make its services generally available "upon reasonable request." 47 U.S.C. § 201(a) & (b). There is no reason to think that a tariff amendment would survive such a challenge. Plainly it would not.

D. The State Orders Violate No Other Federal Policy.

Nor do the state rulings violate any other FCC policy. BellSouth points to rulings made in its section 271 petitions authorizing it to provide in-region long-distance services. In giving BellSouth long-distance authority in Georgia and Louisiana, the FCC rejected competitors' claims that the applications should be denied because of BellSouth's tying practices. In so ruling, the Commission applied its section 271 procedural rule that it would consider only previously established requirements in addressing section 271 applications, and it stated that it had not yet had opportunity to pass on whether this practice violated FCC rules. *Georgia-Louisiana 271 Order* ¶ 157. Obviously, a ruling that the FCC has not yet had occasion to rule on the legality of a practice is not the same thing as a ruling that the practice is legitimate.

Next, BellSouth points to the FCC's *Line Sharing Order*, which the FCC itself referenced in its section 271 orders for the proposition that it had not yet ruled on this ILEC practice. But there, the FCC expressly concluded that additional state regulation in this area would be consistent with its rules, finding that if "AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action." *Line Sharing Reconsideration Order* ¶ 26.

As we just stressed, the fact that the particular federal regulations at issue in that proceeding did not impose a requirement does not logically mean that an independent state regulation that does so is "inconsistent" with federal law or "negates" a "valid federal policy," *NARUC*, 880 F.2d at 431 – as confirmed and emphasized by the federal statutory provisions ensuring that states may impose state law requirements on telecommunications carriers in addition to those imposed by federal law. *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b) & (c). The FCC's finding that BellSouth's conduct is not unlawful under existing federal rules does not establish that the conduct is required or desirable. The sum of the matter is that there is no federal policy encouraging BellSouth to tie its DSL service to its provision of voice telephone services. In the absence of such a policy, there simply can be no conflict or inconsistency between the PSC order and FCC policy. *See Michigan Bell*, 339 F.3d at 434-35 (for "jurisdictionally-mixed" ISP traffic, states entitled to regulate because no conflicting federal requirement exists).

CONCLUSION

For the foregoing reasons, the Commission should deny BellSouth's "Emergency Request for Declaratory Ruling."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark D. Schneider, hereby certify that I have this 30th day of January, 2004, caused a true copy of the Comments of MCI to be served on the parties listed below via first class US Mail postage prepaid:

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